Supreme Court, U.S.
FILED

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No. ——

IN THE
Supreme Court of the United States

K.D.M., a minor, by and through his father and next friend, W.J.M.,
Petitioner,

v.

REEDSPORT SCHOOL DISTRICT and NORMA PAULUS, in her official capacity as Oregon Superintendent of Public Instruction,
Defendant.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

Of Counsel:
RICHARD W. GARNETT
Notre Dame Law School
Notre Dame, IN 46556
(219) 631-6981

MICHAEL STOKES PAULSEN
University of Minnesota
Law School
229 19th Ave. S.
Minneapolis, MN 55455
(612) 625-0018

DAVID C. GIBBS, JR.
Counsel of Record
DAVID C. GIBBS III
CHARLOTTE A. COVER
BARBARA J. WELLER
GIBBS LAW FIRM, P.A.
5666 Seminole Boulevard,
Suite 2
Seminole, Florida 33772
(727) 399-8300
Attorneys for Petitioner

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the Free Exercise Clause of the First Amendment to the United States Constitution permits the State of Oregon to deny on-site special education benefits to otherwise eligible disabled children solely on the basis of the religious setting of the schools chosen for them by their parents.

2. Whether the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution permits the State of Oregon to deny on-site special education benefits to a class of otherwise eligible disabled children solely on the basis of the religious setting of the schools chosen for them by their parents.

PARTIES TO THE PROCEEDINGS

Petitioner

Kai D. Moore, a minor, by and through William J. Moore, his father and next friend

Respondent

Reedsport, Oregon School District

Respondent

Norma Paulus, in her official capacity as Oregon Superintendent of Public Instruction

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PETITION FOR A WRIT OF CERTIORARI

Petitioner KDM, a minor, by and through WJM, his father and next friend, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit in *KDM ex rel. v. Reedsport Sch. Dist.*, 196 F.3d 1046 (9th Cir. 1999), entered on November 15, 1999.

OPINIONS BELOW

The decision of the United States District Court for the District of Oregon is *KDM ex rel. WJM v. Reedsport Sch. Dist.*, No. 96-6075-HO (Trial Division, Department of Justice, Salem, Oregon), (January 5, 1999), is unreported and is reprinted in the Appendix to this Petition, at Appendix C (App. C at 26a-35a).

The decision of the United States Court of Appeals for the Ninth Circuit is *KDM ex. rel. WJM v. Reedsport Sch. Dist.*, 196 F.3d 1046 (9th Cir. 1999), and is reprinted in the Appendix to this Petition, at Appendix B (App. B at 4a-25a).

The Order of the United States Court of Appeals for the Ninth Circuit denying petition for rehearing and petition for rehearing en banc is *KDM ex rel. WJM v. Reedsport Sch. Dist.*, 210 F.3d 1098 (9th Cir. 2000), and is reprinted in the Appendix to this Petition, at Appendix A (App. A at 1a-3a).

JURISDICTION

The jurisdiction of the Court is invoked under 28 U.S.C. § 1254. The judgment of the United States Court of Appeals for the Ninth Circuit was entered on November 15, 1999 (App. B at 4a). Petitioner's timely petition for rehearing and petition for rehearing en banc was denied on April 25, 2000 (App. A at 2a).

CONSTITUTIONAL AND STATUTORY PROVISIONS

United States Constitution

The First Amendment to the United States Constitution provides, in relevant part:

> Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof; or abridging the freedom of speech . . .

U.S. CONST. amend. 1.

The Fourteenth Amendment to the United States Constitution provides, in relevant part:

> No state . . . shall . . . deny to any person within its jurisdiction the equal protection of the laws. . . .

U.S. CONST. amend. 14, § 1.

United States Code

Individuals with Disabilities Education Act (IDEA) 20 U.S.C. §§ 1400-1485 (1998)

Pertinent sections of the IDEA are reprinted in the Appendix to this Petition, at Appendix E (App. E at 49a-52a). Section 1412(a) provides, in relevant part:

(5) Least restrictive environment

(A) In general

> To the maximum extent appropriate, children with disabilities, including children in public or private institutions, . . . are educated with children who are not disabled, and . . . removal of children with disabilities from the regular educational environment occurs only when the nature or severity of the disability of a child is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.

(10) Children in private schools

(A) Children enrolled in private schools by their parents

(i) In general

To the extent consistent with the number and location of children with disabilities in the State who are enrolled by their parents in private elementary and secondary schools, . . .

(II) Such services may be provided to children with disabilities on the premises of private, including parochial, schools, to the extent consistent with law.

Oregon Constitution

Article I of the Oregon Constitution provides, in relevant part:

> No money shall be drawn from the Treasury for the benefit of any religeous [sic], or theological institution, ...

OR. CONST. art. I, § 5.

Oregon Administrative Rules

The Oregon Administrative Rule at issue in this case, OR. ADMIN. R. 581-015-0166 (1995), is reprinted in the Appendix to this Petition, at Appendix F (App. F at 53a-55a), and provides, in relevant part:

(3) [S]pecial education and related services shall be provided in a religiously-neutral setting.

STATEMENT OF THE CASE

This case presents the question whether a public school district may refuse to provide on-site special education services to a child with disabilities solely on the basis of his attendance at a religious rather than a non-religious private school.

1. Petitioner Kai Moore is a 14-year-old boy, who lives with his parents, William and Gwen Moore, in an area of rural Oregon served by the Reedsport School District. Department of Public Instruction Order (hereinafter "DPI Order"), Finding of Fact No. 1 (hereinafter "FF") (App. D at 37a). Kai is blind and suffers from cerebral palsy, but otherwise possesses full cognitive abilities. Kai's disabilities identify him as a "child with disabilities" under the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. §§ 1400 *et seq.* DPI Order, FF 2 (App. D at 37a). By law, he is eligible for a broad range of special education benefits, to be determined by his public school district. DPI Order, FF 3 and 5 (App. D at 37a).

Since 1993, Kai has been enrolled in Harbor Baptist Church School, a school that teaches the religious values and ideals the Moores wish Kai to learn as part of his education and upbringing. DPI Order, FF 6 (App. D at 38a). Under the IDEA, as administered by the State of Oregon, Kai is entitled to receive special education services as provided by his public school district, even though he attends private school. DPI Order, FF 3 (App. D at 37a). *See also* OR. ADMIN. R. 581-015-0166(2) (1995) (App. F at 53a). Federal law permits, but does not require, IDEA services to be provided on the premises of a private school. *See* 20 U.S.C. § 1412(a)(10)(A)(i)(II) (1998) (App. E at 50a).

The Reedsport School District's policy is to provide special education services, whenever possible, in the child's regular school setting, including on the premises of a child's private school. DPI Order, FF 3, 4, 5 and 8 (App. D at 37a, 38a).

However, an Oregon administrative rule forbids the provision of special education services at a private school if the private school is a religious school. OR. ADMIN. R. 581-015-0166(3) (1995) (App. F at 53a). As a consequence, the policy and practice of the Reedsport School District is to provide on-site special education services to children with disabilities attending public schools and *non-religious* private schools, but withhold such services from children with disabilities attending *religious* private schools. *See KDM ex rel. v. Reedsport Sch. Dist.*, No. 96-6075-HO (D. Or. filed January 5, 1998) (App. C at 33a).[1]

The parties stipulated that if Kai attended either a public school or a non-religious private school, his special education services would be provided on-site. It is only because Kai attends a religious private school that respondent school district will not provide services on-site. DPI Order, FF 8 (App. D at 38a). As the court below recognized, the operation of the Oregon administrative rule " 'discriminates' against students in religious schools, i.e., treats them differently by denying them state services on the school grounds" of a private religious school, but not on the grounds of a private non-religious school. *KDM v. Reedsport Sch. Dist.*, 196 F.3d 1046, 1051 (1999) (App. B at 11a).

2. The Moore family first sought relief in an administrative hearing. The hearing officer found as facts,

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[1] Under IDEA, children with disabilities are to be provided special services in the "[l]east restrictive environment." 20 U.S.C. § 1412(a)(5) (App. E at 49a-51a). Removal from the child's "regular educational environment" is discouraged under the IDEA. 20 U.S.C. § 1412(a)(5)(A) (App. E at 49a-50a). *See Board of Educ. of Kiryas Joel v. Grumet*, 512 U.S. 687, 717 (1994) (O'Connor, J., concurring in part and concurring in the judgment) ("If the government provides this education on-site at public schools and at nonsectarian private schools,it is only fair that it provide it on-site at sectarian schools as well.").

consistent with the parties' stipulation, that Kai is legally blind and has cerebral palsy, is entitled to receive special education assistance on the basis of his disability, that the Moores enrolled Kai in Harbor Baptist Church School "based on their sincerely-held religious conviction and beliefs," and that "[Kai] is not being provided the services of a vision specialist in his regular classroom at the Harbor Baptist Church School by the District *because of the religious nature of the school*. This is the sole issue in the dispute." DPI Order, FF 2-6 and 8 (emphasis added) (App. D at 38a).

The hearing officer noted that the services "are provided at a nearby fire hall because Oregon law prohibits the services from being provided in the school." DPI Order at 6 (App. D. at 42a). *See also* OR. ADMIN. R. 581-015-0166(3) (1995) (App. F at 53a). The hearing officer concluded that the denial of on-site services to Kai was both appropriate and required. *See* DPI Order (App. D at 46a).

3. Having exhausted administrative remedies, the Moores brought this action in the United States District Court for the District of Oregon. Following a bench trial on stipulated facts, the district court entered judgment holding that the IDEA did not require the District to provide services at a private school, but that the Oregon Administrative Rule which permits services to be provided to private school students only in a non-religious setting violates the Free Exercise, Establishment, and Equal Protection Clauses of the United States Constitution.

The district court held that after the District made a decision to provide on-site disability services in private schools, the State could not then deny them to a student merely because he attended a private religious school. The district court held that such a denial imposes a burden on Kai and his parents' "free exercise rights by forcing them to choose between enrolling at Harbor Baptist and receiving special education at the fire hall or enrolling at a non-

religious school and receiving in-class services." *KDM ex rel. v. Reedsport Sch. Dist.*, No. 96-6075-HO, slip op at 8. (D. Or. filed January 5, 1998) (App. C at 32a).

The district court concluded that Oregon's Rule violates the Equal Protection Clause because it lacks either a compelling justification or a rational basis and "has the effect of allowing in-class services to disabled students at non-religious schools, both public and private" while prohibiting in-class services to disabled students at religious schools, DPI Order at 6 (App. C at 33a). The court then enjoined the District "from following a policy of providing special education and related services to disabled students at religious schools on different terms than provided to disabled students at non-religious schools." DPI Order at 6 (App. C at 33a).

4. A panel of the United States Court of Appeals for the Ninth Circuit reversed the district court by a divided vote (2-1), Judge Kleinfeld dissenting. *KDM ex rel. v. Reedsport Sch. Dist.*, 196 F.3d 1046 (9th Cir. 1999) (App. B. at 4a-26a). The majority acknowledged that the "regulation . . . 'discriminates' against students in religious schools, i.e., treats them differently by denying them state services on the school grounds." *Id.* at 1051 (App. B at 11a). Nonetheless, the panel majority concluded, "Oregon's regulation as applied to KDM and his parents does not impose an impermissible burden on their free exercise of religion." *Id.* (App. B at 11a). Kai could still receive special education services "at the fire hall down the street." *Id.* (App. B at 10a). The panel held that official discrimination on the basis of religion in a government program does not itself violate the Free Exercise Clause in the absence of "evidence of a 'substantial animus . . . that motivated the law in question.' " *Id.* at 1051 (quoting *Strout v. Albanese*, 178 F.3d 57 (1st Cir. 1999), *cert. denied*, 120 S.Ct. 329 (1999) (App. B. at 11a). The panel believed that "the Oregon regulation is not 'neutral' " with respect to religion. *KDM*, 196 F.3d at 1050 (App. B. at 10a).

Nonetheless, the panel concluded the Free Exercise Clause requires a further showing that even a facially discriminatory statute has the object or "purpose" of suppression of "religion or religious conduct." *Id.* at 1051 (quoting *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993)) (App. B at 11a). The panel concluded that "[t]he mere fact that the District makes its service to KDM available in the fire hall down the street from his school does not amount to suppression of religion or religious conduct." *KDM*, 196 F.3d at 1051 (App. B at 10a).

The panel stated that *Peter v. Wedl*, 155 F.3d 992 (8th Cir. 1998), which reached the opposite result on similar facts, was distinguishable. The panel did not suggest that the result in *Peter* was based on a showing of religious animus, however. Rather, the panel thought the case distinguishable on the ground that the plaintiff in *Peter* "was forced to choose" between attending religious school and "receiving services essential to his ability to attend school." *KDM*, 196 F.3d at 1051 (App. B at 9a-10a). The panel did not, however, dispute findings of the hearing officer that KDM could not receive on-site disability services at his religious school.

The panel also rejected the Equal Protection Clause claim, on the ground that "parochial school students are not a suspect class." *Id.* at 1052 (App. B at 13a). The panel concluded that the State of Oregon's interpretation of its state constitution was a sufficiently "rational basis" for discriminating against a child with disabilities in provision of special education benefits on the basis of the child's attendance at a religious school. *Id.* (App. B. at 13a).

Judge Kleinfeld vigorously dissented, citing conflicting rulings by this Court and by three other circuits. Judge Kleinfeld wrote:

> Under today's decision the government may discriminate against people based on their exercise of

> religion, so long as the discriminatory burdens it imposes are not more substantial than requiring a blind child with cerebral palsy to leave his school building and go down the street to a fire hall. That is quite a surprise. Fortunately, that is not the law in most of the rest of the country. The Supreme Court and the Third, Sixth, and Eighth Circuits have all held to the contrary—the Eighth Circuit in a case materially identical to this one.

KDM, 196 F.3d at 1052 (Kleinfeld, J., dissenting) (footnotes omitted) (*citing, inter alia, Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993); *Brown v. Borough of Mahaffey*, 35 F.3d 846 (3rd Cir. 1994); *Hartmann v. Stone*, 68 F.3d 973 (6th Cir. 1995); and *Peter v. Wedl*, 155 F.3d 992 (8th Cir. 1998)) (App. B. at 15a).

Judge Kleinfeld identified the error in the panel's Free Exercise Clause analysis as its reliance on the test used when laws are neutral with respect to religion, rather than the test used when a law or rule is religiously discriminatory on its face. *See KDM*, 196 F.3d at 1053 (Kleinfeld, J., dissenting) (App. B at 16a). Judge Kleinfeld noted that, by the majority's own admission, this was a case of the latter type. "When the government, by a law not neutral on its face, treats people of one or all religions better or worse than others, the constitutional question is traditionally formulated so that the answer has to be 'No!' " *Id.* (Kleinfeld, J., dissenting) (App. B at 16a). In the instant case, "[h]andicapped children at secular private schools get special education in their schools, but handicapped children at religious private schools must leave school to get the same education. This law violates the Constitution because it distinguishes between people and burdens some of them on account of their religious practices." *Id.* (Kleinfeld, J., dissenting) (App. B at 17a).

Judge Kleinfeld noted that the majority's opinion "puts us at odds with three other circuits to have considered analogous issues." *Id.* (Kleinfeld, J., dissenting) (App. B. at 17a). In

particular, he emphasized that the Eighth Circuit's decision in "*Peter v. Wedl* is materially identical to the case we decide today, yet the Eighth Circuit reache[d] the opposite conclusion." *Id.* at 1054 (Kleinfeld, J., dissenting) (App. B at 19a). The Eighth Circuit held that "[g]overnment discrimination based on religion violates the Free Exercise Clause of the First Amendment." *Id.* (Kleinfeld, J., dissenting) (quoting *Peter*, 155 F.3d at 995, where the Eighth Circuit struck down a Minnesota regulation essentially identical to the Oregon regulation as a violation of the Free Exercise, Equal Protection, and Free Speech Clauses) (App. B at 19a). Judge Kleinfeld found that "[t]he majority's attempt to distinguish *Peter* makes no sense because, there, as here, the regulation allowed special education services only at a religiously 'neutral site.' " *Id.* at 1055 (Kleinfeld, J., dissenting) (citation omitted) (App. B at 21a). "That case and this one are, for analytic purposes, carbon copies." *Id.* (Kleinfeld, J., dissenting) (App. B at 21a).

5. Rehearing en banc was denied on April 25, 2000, with six judges dissenting (O'Scannlain, Kozinski, T.G. Nelson, Kleinfeld, Tashima, and Wardlaw). *KDM v. Reedsport Sch. Dist.*, 210 F.3d 1098 (2000) (App. A at 1a-3a). The dissent embraced Judge Kleinfeld's panel dissent and further emphasized that "the panel majority's opinion, in crafting a *de minimis* exception to the Free Exercise Clause's requirement of neutrality toward religion, contributes to the growing confusion among the lower courts over the demands of the First Amendment." *Id.* at 1099 (O'Scannlain, J., dissenting from denial of rehearing en banc) (App. A at 3a). The six judges concluded:

> It cannot be denied that this case, which simultaneously implicates the Free Exercise, Establishment, and Equal Protection Clauses, involves questions of extraordinary importance. . . . [T]he panel majority's opinion misreads

> Supreme Court precedent and is inconsistent with well-reasoned decisions of our sister circuits.

Id. (O'Scannlain, J., dissenting from denial of rehearing en banc) (App. A at 3a).

REASONS FOR GRANTING THE WRIT

I. The Decision Below Conflicts Directly with the Eighth Circuit's Decision in *Peter v. Wedl*, 155 F.3d 992 (8th Cir. 1998).

The Ninth Circuit conceded that the regulation at issue below " 'discriminates' against students in religious schools, i.e., treats them differently by denying them state services on the school grounds." *KDM*, 196 F.2d 1046, 1051 (9th Cir. 1999) (App. B at 11a). This, then, is a case about admitted discrimination—discrimination against "religious ideas, religious people, [and] religious schools." *Board of Educ. of Kiryas Joel v. Grumet*, 512 U.S. 687, 717 (1994) (O'Connor, J., concurring in part and concurring in the judgment) ("The Religion Clauses prohibit the government from favoring religion, but they provide no warrant for discriminating against religion."). Oregon provides an immensely valuable benefit—special education services—to every eligible "child with disabilities." Petitioner has been denied this educational benefit *solely* because his parents have chosen a religious school whose purpose it is to impart religious tenets of faith and values to its students by means of religious instruction in a religious environment and setting. Respondent's Administrative Rule 581-015-0166 violates the "equal treatment" principle at the heart of the Free Exercise and Equal Protection Clauses of the First and Fourteenth Amendments to the United States Constitution and conflicts with the Eighth Circuit's decision in *Peter v. Wedl*, 155 F.3d 992 (8th Cir. 1998).

In *Peter*, two families with disabled children challenged their school districts' refusal to provide on-site special education services at the families' chosen religious schools. The school districts relied in part on a Minnesota State Rule that required districts to provide on-premises services to children who needed them at a public school or at a private *non*-religious school, but forbade provision of such services at a private *religious* school. Minnesota's distinction tracked exactly the line drawn by Oregon's Rule and the Ninth Circuit in this case. The Minnesota Rule, in the Eighth Circuit's words, "explicitly discriminated against children who attended private religious schools." *Peter*, 155 F.3d at 996.

The Eighth Circuit concluded that such "[g]overnment discrimination based on religion violates the Free Exercise Clause of the First Amendment, . . . the Free Speech Clause of the First Amendment, . . . and the Equal Protection Clause of the Fourteenth Amendment." *Id.* at 996 (citing *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 532 (1993); *Rosenberger v. Rector and Visitors of University of Virginia*, 515 U.S. 819, 830 (1995); and *Romer v. Evans*, 517 U.S. 620, 633 (1996)).

The court in *Peter* held that Establishment Clause principles could not justify the discriminatory exclusion from an education benefit program. *See Peter*, 155 F.3d at 997. Minnesota's Rule, therefore, "violated the plaintiffs' rights to free exercise of religion, free speech, and equal protection, and the district court properly enjoined its enforcement." *Id.* The Eighth Circuit noted that one school district's stated policy of religious neutrality appeared to be a "mere pretext for religious discrimination." *Id.* On remand, the district court granted full relief to the families. *Westendorp v. ISD No. 273*, 35 F. Supp. 2d 1134 (D. Minn. 1998).

The conflict between *Peter* and the decision of the Ninth Circuit below against KDM is stark. Both cases involve on-

site provision of special education benefits to disabled students attending private schools. Both cases involve governmental discrimination by withholding benefits from those disabled students who attend religious private schools, while providing the benefits to those students who attend non-religious private schools.

The Ninth Circuit held that it is permissible to discriminate on the basis of religion. The Eighth Circuit, on nearly identical facts, said that religious discrimination violates the Free Exercise Clause and the Equal Protection Clause. The Ninth Circuit said religious discrimination is permissible as long as it is just a *tiny* discrimination, such as making a blind child with cerebral palsy take a painful walk out of his religious school in the middle of his school day to travel several blocks to a fire hall.

In *Peter*, the Eighth Circuit found such discrimination unconstitutional under the Free Speech and Free Exercise Clauses. The Ninth Circuit, on the other hand, upheld such facial discrimination. It is difficult to imagine a more direct conflict than that which exists between the Ninth Circuit's opinion below and the Eighth Circuit's opinion in *Peter v. Wedl*.

II. The Ninth Circuit's Requirement That Petitioner Produce Evidence of the Substantial Burden Imposed by Respondent's Facially Discriminatory Rule Conflicts with This Court's and Other Circuit Courts' Analysis of Non-Neutral Governmental Action.

The decision below held that Oregon's "religiously-neutral setting" regulation, *as applied*, does not violate the free exercise of religion rights of KDM and his parents because it does not impose an impermissible burden on their free exercise rights. *See KDM*, 196 F.3d at 1050 (App. B at 11a). The Ninth Circuit's use of an "as applied" analysis of

Petitioner's Free Exercise challenge to Oregon's facially discriminatory regulation is in conflict with this Court's directives that a plaintiff who challenges a facially discriminatory state action is not to be subjected to the "as applied" task of producing evidence of either an impermissible or substantial burden to his free exercise of religion or of a religious animus or intent motivating the adoption of the discriminatory statute. The "substantial burden" requirement is also in conflict with the better reasoned decisions of other Circuit Courts.

The Third Circuit considered and discarded the proposition that plaintiffs must show more than a *de minimis* burden for a Free Exercise challenge to a facially discriminatory law. In *Brown v. Borough of Mahaffey*, 35 F.3d 846 (3rd Cir. 1994), the Borough of Mahaffey intentionally targeted the plaintiffs' religious activities when it erected and locked a gate between a public park and property which was to be used by the plaintiffs for religious tent revival meetings. The district court ruled against the Free Exercise claim because the plaintiffs had not demonstrated a "substantial burden" upon their religion by the borough's actions. The Third Circuit, however, held the substantial burden analysis to be appropriate only with free exercise challenges to neutral, generally applicable laws, not to claims involving intentional burdening of religious exercise.

> The rare cases which address acts or laws which target religious activity have never limited liability to instances where a "substantial burden" was proved by the plaintiff. *See Lukumi Babalu Aye*, 508 U.S. [520], 113 S.Ct. 2217. Applying such a burden test to non-neutral government actions would make petty harassment of religious institutions and exercise immune from the protection of the First Amendment. . . . Because government actions intentionally discriminating against religious exercise *a fortiori* serve no legitimate purpose, no balancing test is

necessary to cabin religious exercise in deference to such actions.

Brown, 35 F.3d at 849-850. Because the Oregon Rule is discriminatory on its face, the court below mixed apples and oranges when it required KDM to demonstrate a substantial burden upon his religion.

The decision below is also in conflict with the Sixth and Eighth Circuit Courts of Appeal, which have followed this Court's precedents in its analyses of non-neutral laws. In *Hartmann v. Stone*, 68 F.3d 973 (6th Cir. 1995), the plaintiffs were challenging an Army regulation prohibiting on-base family child care providers from having any religious practices during day care conducted in providers' homes. The plaintiff in *Peter v. Wedl*, 155 F.3d 992 (8th Cir. 1988), raised a challenge to the Minnesota law which was virtually identical to that brought herein. Neither *Hartmann* nor *Peter* required a showing that the facially discriminatory law imposed a substantial burden upon the plaintiffs' exercise of religion. Both Circuits held that *Lukumi* required them to make only two inquiries into the validity of the discriminatory statutes. "First, is there a compelling interest to justify this rule, and second is it narrowly tailored to meet that interest." *Hartmann*, 68 F.3d at 979. *See also Peter*, 155 F.3d 996-997.

The court below upheld the facially discriminatory law because there was "no showing that *application* of the regulation to KDM's case burdens KDM's or his parents' free exercise of religion." *KDM*, 196 F.3d at 1050 (emphasis added) (App. B at 10a). The court recognized that the Oregon regulation was not neutral, referring to *Employment Div. of Oregon v. Smith*, 494 U.S. 872 (1990), in doing so. Nevertheless, the court immediately treated the non-neutral regulation to an "as applied" analysis and held that "as applied here" the religiously-neutral setting rule does not

result in a burden on the free exercise of religion. *See KDM*, 196 F.3d at 1050 (App. B at 10a).

Requiring Petitioner to show a substantial burden upon his free exercise of religion by the facially discriminatory Oregon rule conflicts with the analysis of a non-neutral law set out by this Court in *Lukumi* and followed by the Sixth and Eighth Circuits.

III. The Decision Below Conflicts with This Court's Precedents Holding That the First Amendment Forbids Discriminatory Exclusion from a Government Program, Benefit, or Forum on the Basis of Religious Belief, Exercise, Affiliation, or Expression.

It is the bedrock principle of this Court's First Amendment jurisprudence that the "government may not . . . impose special disabilities on the basis of religious views or religious status." *Employment Div. of Oregon v. Smith*, 494 U.S. 872, 877 (1990); *see also, e.g., McDaniel v. Paty*, 435 U.S. 618, 639 (1978) (Brennan, J., concurring in the judgment) ("government may not use religion as a basis for classification for the imposition of duties, penalties, privileges or benefits"). If the Free Exercise Clause means anything at all, it means that government may not "discriminate[] against some or all religious beliefs or regulate[] or prohibit[] conduct because it is undertaken for religious reasons." *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 532 (1993). As this Court said, long ago in *Everson*, this non-discrimination rule is no less fundamental than the Establishment Clause's command that the government not require or subsidize religious observance:

> [The First] Amendment requires the state to be a neutral in its relations with groups of religious believers and non-believers; it does not require the state to be their

> adversary. State power is no more to be used so as to handicap religions than it is to favor them.

Everson v. Board of Educ., 330 U.S. 1, 18 (1947).

Religious exercise and expression, including choosing to educate one's child in a religious tradition, has long been valued, not feared, in our constitutional tradition. Directing and supervising a child's education, especially a disabled child, is perhaps the most important and personal constitutionally protected activity most people ever exercise. Penalizing and stigmatizing that precious activity is contrary to the principles that undergird the First and Fourteenth Amendments.

A. The Decision Below Conflicts with This Court's Decision in *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993).

In *Lukumi*, this Court invalidated city ordinances that prohibited religiously motivated animal sacrifice by adherents of the Santeria religion. The Court said that "[a]t a minimum, the protections of the Free Exercise Clause pertain if the law at issue discriminates against some or all religious beliefs or regulates or prohibits conduct because it is undertaken for religious reasons." *Church of the Lukumi Babalu Aye, Inc.*, 508 U.S. 520, 532 (1993); accord *Employment Div. v. Smith*, 494 U.S. 872, 877 (1990) ("government may not . . . impose special disabilities on the basis of religious views or religious status").

Contrary to the requirement imposed by the court below, *Lukumi* does not require a litigant who challenges a facially discriminatory regulation to prove a "substantial animus" motivation for the government. *See KDM*, 196 F.3d at 1051. (App. B at 11a). Nor does it require a litigant to show that a facially discriminatory law substantially burdens his religion as does the court below. *See id.* (App. B at 11a) In *Lukumi*,

this Court expressly reaffirmed its intention that laws which are "not neutral or not of general application must undergo the most rigorous of scrutiny, . . . must advance 'interests of the highest' order and must be narrowly tailored in pursuit of those interests." *Lukumi*, 508 U.S. at 546 (quoting *McDaniel v. Paty*, 435 U.S. 618, 628 (1978). Yet because the Ninth Circuit could find no impermissible burden on KDM's or his parents' free exercise of religion in a state regulation that facially discriminates against them, the Ninth Circuit saw no need to apply strict scrutiny and judged Oregon's Rule "under the rational basis test." *KDM*, 196 F.3d at 1051-52 (App. B at 11a).

It is rare indeed that facially discriminatory laws could survive strict scrutiny. At a minimum, the free exercise of religion means that

> [t]he government may not . . . impose special disabilities on the basis of religious views or religious status, see McDaniel v. Paty, 435 U.S. 618 (1978); Fowler v. Rhode Island, 345 U.S. 67 (1953); cf. Larson v. Valente, 456 U.S. 228, 245 (1982).

Employment Div. v. Smith, 494 U.S. at 877. The Oregon regulation does just that—it imposes a special disability upon the religious status of being parochial school students. Under Oregon's Rule, a student in need of IDEA services may attend either a public school or a private secular school and receive services at his school. If the same student is a parochial school student, he may not receive on-site services. The First Amendment does not permit such religious discrimination absent a compelling interest, which is not present here.

In this case, no less than in *Lukumi*, the government action at issue discriminates on the basis of religion. Oregon parents who choose religious schools are denied otherwise available government services *precisely* because of the religious nature

of their choice. The judgment below thus conflicts directly with the most central principle of the Free Exercise Clause as stated in *Smith* and *Lukumi*.

B. The Decision Below Conflicts with This Court's Decision in *McDaniel v. Paty*, 435 U.S. 618 (1978).

McDaniel presented the question whether a Tennessee statute barring "Minister[s] of the Gospel, or priest[s] of any denomination whatever" from serving as delegates to the State's constitutional convention violated the Free Exercise Clause. *McDaniel*, 435 U.S. at 620. This Court noted that Tennessee extended to its adult citizens generally the right to seek and hold office as delegates, and observed that by denying that right to clergy "the State ha[d] conditioned the exercise of one [right] on the surrender of the other." *Id.* at 626. The Court stated emphatically: "In so doing, Tennessee has encroached upon McDaniel's right to the free exercise of religion." *Id.*

Justice Brennan's concurrence drove home the clash between this case and *McDaniel* even more forcefully. He highlighted the fact that the Tennessee disqualification "imposes a unique disability upon those who exhibit a defined level of intensity of involvement in protected religious activity." *Id.* at 632 (Brennan, J., concurring). He noted that the Tennessee statute "requires appellant's disqualification solely because he is a minister of a religious faith. If appellant were to renounce his ministry, presumably he could regain eligibility for elective office, but if he does not, he must forgo an opportunity for political participation he otherwise would enjoy." *Id.* at 634 (Brennan, J., concurring). After emphasizing the neutrality principle that is at the heart of the First Amendment's Religion Clauses, Justice Brennan insisted that "government may not use religion as a basis of classification for the imposition of duties, penalties, privileges or benefits." *Id.* at 639 (Brennan, J., concurring).

The decision below is inconsistent with this Court's reasoning and holding in *McDaniel* and with the equality principles expounded in Justice Brennan's concurrence. Oregon has done precisely what Justice Brennan observed government may *not* do. Having decided to provide special education services to private school students, it has "use[d] religion as a basis of classification" in the administration of that program and "impose[d] a unique disability" on otherwise eligible beneficiaries who choose religious schools. *Id.* at 632, 639. Even worse, Oregon has, like Tennessee did in *McDaniel*, communicated to this blind boy with cerebral palsy and his parents that the price of enjoying a benefit generally available to a disabled student under Oregon law, on-site special education services, is giving up the right to an uninterrupted, unstigmatized education at his own school with his own classmates.

IV. The Questions Presented Are of National Importance and Affect the Nation's Efforts to Protect the Rights of Children with Disabilities and Parents of Such Children.

The constitutional questions presented in this case have broad significance for the important and ongoing effort to ensure that all children with disabilities have available to them appropriate services wherever they attend school and to "ensure that the rights of children with disabilities and parents of such children are protected." 20 U.S.C. § 1400(d)(a)(A) and (B)(1998). Across the nation, states and local school districts are striving to meet the needs of disabled students. Unfortunately, these initiatives have often been frustrated by confusion as to whether special education services may be provided on-site to parochial school students without running afoul of the Establishment Clause.

This Court has in recent years done much to clarify that the First Amendment does not require hostility toward religion and to emphasize that the independent choices of parents to

provide a religious education for their children should not foreclose them from otherwise-available on-site educational benefits.[2] But the failure of lower courts to reach consistent conclusions regarding the constitutionality of structurally similar educational benefit programs impedes parents' free exercise of their religious education choices for their children, in this case their disabled children, and subjects the children to shameful discriminatory treatment that would not be tolerated were it based on any suspect classification other than religion. Still, states and local governments continue to press forward with provision of educational benefits even as they await a definitive resolution by this Court of the First and Fourteenth Amendment issues surrounding the question of whether these benefits should be equally available on-site at private religious schools, particularly when, as here, those benefits would be available on-site to a child in a non-religious private school.

Universal, equal, and non-discriminatory treatment for all children, in this case specifically for disabled children who attend religious schools, depends upon a clear ruling from this Court that (1) educational benefit initiatives are generally consistent with the Establishment Clause's neutrality mandate; and, more specifically, (2) educational benefit programs such as IDEA may not discriminate against disabled children whose parents choose to send them to religious schools.

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[2] *See Mitchell v. Helms*, — S.Ct. —, No. 98-1648, 2000 WL 826256 (U.S. La. June 28, 2000); *Agostini v. Felton*, 521 U.S. 203 (1997); *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819 (1995); *Zobrest v. Catalina Foothills Sch. Dist.*, 509 U.S. 1 (1993); *Witters v. Washington Dep't of Servs. for the Blind*, 474 U.S. 481 (1986); *Mueller v. Allen*, 463 U.S. 388 (1983).

CONCLUSION

For all the foregoing reasons, Petitioner urges this Court to grant the requested Petition for Certiorari and to resolve the constitutional questions presented in this case in favor of equal treatment and free exercise.

Respectfully submitted,

Of Counsel:
RICHARD W. GARNETT
Notre Dame Law School
Notre Dame, IN 46556
(219) 631-6981

MICHAEL STOKES PAULSEN
University of Minnesota
Law School
229 19th Ave. S.
Minneapolis, MN 55455
(612) 625-0018

DAVID C. GIBBS, JR.
Counsel of Record
DAVID C. GIBBS III
CHARLOTTE A. COVER
BARBARA J. WELLER
GIBBS LAW FIRM, P.A.
5666 Seminole Boulevard,
Suite 2
Seminole, Florida 33772
(727) 399-8300
Attorneys for Petitioner

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 98-35186

D.C. No.
CV-96-06075-MRH

KDM, a minor, by and through
WJM, his father and next friend,
Plaintiff-Appellant,

v.

REEDSPORT SCHOOL DISTRICT;
NORMA PAULUS, in her official capacity as
Oregon Superintendent of Public Instruction,
Defendants-Appellees.

No. 98-35187

D.C. No.
CV-96-06075-MRH
ORDER

KDM, a minor, by and through
WJM, his father and next friend,
Plaintiff-Appellant-Cross-Appellee,

v.

REEDSPORT SCHOOL DISTRICT,
Defendant,

and

NORMA PAULUS, in her official capacity as
Oregon Superintendent of Public Instruction,
Defendant-Appellee-
Cross-Appellant.

Filed April 25, 2000

Before: Andrew J. Kleinfeld and Michael Daly Hawkins, Circuit Judges, and William W. Schwartzer,[1] Senior District Judge.

Order: Dissent by Judge O'SCANNLAIN.

ORDER

Judge Kleinfeld voted to grant the petition for rehearing and the petition for rehearing en banc. Judge Hawkins voted to deny the petition for rehearing and the petition for rehearing en banc. Judge Schwarzer voted to deny the petition for rehearing and recommended denial of the petition for rehearing en banc.

The full court has been advised of the petition for rehearing en banc. An active judge requested a vote on whether to rehear the matter en banc. The matter failed to receive a majority of the votes of the nonrecused active judges in favor of en banc consideration. Fed. R. App. P. 35(b).

The petition for rehearing and the petition for rehearing en banc are denied.

O'SCANNLAIN, Circuit Judge, with whom KOZINSKI, T.G. NELSON, KLEINFELD, TASHIMA, and WARDLAW, Circuit Judges, join, dissenting from denial of rehearing en banc:

Judge Kleinfeld's excellent opinion explains in detail the errors in the panel majority's analysis and its fundamental

[1] The Honorable William W Schwarzer, Senior United States District Judge for the Northern District of California, sitting by designation.

inconsistency with Supreme Court precedent. I write only to observe that the panel majority's opinion, in crafting a *de minimis* exception to the Free Exercise Clause's requirement of neutrality toward religion, contributes to the growing confusion among the lower courts over the demands of the First Amendment. *See Columbia Union College v. Clark,* 119 S. Ct. 2357, 2358 (1999) (Thomas, J., dissenting from the denial of certiorari). It is only a matter of time before the Supreme Court confronts this confusion to make clear what should have already been clear to a faithful reader of *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah,* 508 U.S. 520 (1993). While a facially neutral law may be unconstitutional if its true object "is to infringe upon or restrict practices because of their religious motivation," *id.* at 533, a law that is *non-neutral on its face,* like the Oregon regulation at issue here, triggers strict (and almost always fatal) scrutiny—even in the absence of extrinsic evidence suggesting that the law was the result of anti-religious bigotry or animus.

It cannot be denied that this case, which simultaneously implicates the Free Exercise, Establishment, and Equal Protection Clauses, involves questions of extraordinary importance. Because the panel majority's opinion misreads Supreme Court precedent and is inconsistent with well-reasoned decisions of our sister circuits, I respectfully dissent from the court's denial of rehearing en banc.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 98-35186, 98-35187

KDM, a minor, by and through WJM, his father and next friend,
Plaintiff-Appellant,

v.

REEDSPORT SCHOOL DISTRICT; NORMA PAULUS, in her official capacity as Oregon Superintendent of Public Instruction,
Defendants-Appellees.

KDM, a minor, by and through WJM, his father and next friend,
Plaintiff-Appellant-Cross-Appellee,

v.

REEDSPORT SCHOOL DISTRICT,
Defendant,

and

Norma Paulus, in her official capacity as Oregon Superintendent of Public Instruction,
Defendant-Appellee-Cross-Appellant.

Argued and Submitted March 1, 1999.

Filed Nov. 15, 1999.

Before: KLEINFELD and HAWKINS, Circuit Judges, and SCHWARZER,* Senior District Judge.

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* The Honorable William W Schwarzer, Senior United States District Judge for the Northern District of California, sitting by designation.

Opinion by Judge SCHWARZER; Dissent by Judge KLEINFELD.

SCHWARZER, Senior District Judge:

WJM's son, KDM, is a minor who is legally blind and has cerebral palsy. As such, KDM is a "child with disabilities" entitled to special education and related services under the Individuals with Disabilities Education Act ("IDEA"), 20 U.S.C. §§ 1400-1485 (1994). Oregon provides such services to children enrolled in public schools. The Oregon administrative regulation leaves it to the discretion of individual school districts whether to provide such services to children enrolled in private school but specifically provides that "such special education and related services shall be provided in a religiously-neutral setting." OAR 581-15-166 (the "regulation").[1] Defendant Reedsport School District

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[1] OAR 581-15-166 states in full:

> Public Educational Agency Responsibility for Children Placed by Parents in Private Schools
>
> (1) If a child with a disability, who is three through the age of eligibility for kindergarten, is offered a free and appropriate public education by the Department of Education and the parent of the child unilaterally enrolls the child in a private school, the child shall not have an individual entitlement to receive special education and related services from the Department of Education. Consistent with the procedures set forth in OAR 581-15-171, the Department of Education shall determine which children with disabilities shall receive services, what services shall be provided and how those services shall be provided, including the location for delivery of those services.
>
> (2) If a child with a disability, who is at the age of eligibility for kindergarten through age 21, is offered a free appropriate public education by the child's resident school district and the parent of the child unilaterally enrolls the child in a private school, the child shall not have an individual entitlement to receive special education and

("District") is willing to provide such services to KDM, but not at KDM's parochial school. We must decide whether the District's refusal to provide services at the school violates the IDEA or KDM's rights under the Free Exercise, Establishment, or Equal Protection Clauses of the Constitution.

I. FACTUAL AND PROCEDURAL BACKGROUND

While attending public school, KDM received from the District the services of a vision specialist, physical therapy and special equipment at his school. Motivated by sincerely-held religious beliefs, KDM's parents transferred him to Harbor Baptist Church School ("Harbor Baptist"), a sectarian school. After the transfer, the District continued to supply him with special equipment (braillers, computers and other special equipment) at his new school. However, viewing the Harbor School setting as not religiously-neutral, it no longer supplied the vision specialist at the school. Instead, it provided that service at a fire hall down the street from Harbor Baptist. The adequacy of the service is not in dispute nor is it disputed that it is safe for KDM to travel to and from the fire hall, transportation being provided by the District. The service is provided for approximately ninety minutes

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related services from the child's resident school district. Consistent with the procedures set forth in OAR 581-15-171, resident school districts shall determine which children with disabilities shall receive services, what services shall be provided and how those services shall be provided, including the location for the delivery of those services.

(3) Such special education and related services shall be provided in a religiously-neutral setting.

(4) The Department of Education and school districts shall provide such children with genuine opportunities for equitable participation in special education consistent with the number of children and their needs.

twice a week. If this service were provided at Harbor Baptist, it would be provided in a room separate from the classroom because providing it in class could be disruptive to the instruction both of KDM and the other students in the classroom.

KDM brought this action through his father, WJM, against the District and Norma Paulus, Oregon's Superintendent for Public Instruction, for declaratory and injunctive relief requiring the defendants to place a vision specialist at Harbor Baptist. Plaintiff, in substance, made three claims: First, that defendants' refusal to provide a vision specialist at School violates the IDEA; second, that it violates the Free Exercise and Establishment clauses of the First Amendment; and, third, that it denies plaintiff the equal protection of the laws. Following a bench trial on stipulated facts, the district court entered judgment holding that the IDEA did not require the district to provide services at a private school, but that the Oregon regulation which permits services to be offered private school students only in a religiously-neutral setting violated the Free Exercise, Establishment and Equal Protection Clauses and enjoined its enforcement.[2] We have subject matter jurisdiction under 20 U.S.C. § 1415(e)(2) and appellate jurisdiction under 28 U.S.C. § 1291 (1994), and review the district court's legal conclusions de novo. *See Walters v. Reno*, 145 F.3d 1032, 1047 (9th Cir.1998), *cert. denied*——U.S.——, 119 S.Ct. 1140, 143 L.Ed.2d 208 (1999). We now reverse the judgment.[3]

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[2] The record does not disclose whether Reedsport or other school districts provide services at nonsectarian private schools, but the regulation does not preclude them from doing so.

[3] Because the court entered judgment only on Counts III and IV, plaintiff's constitutional claims, our mandate is limited to those counts.

II. THE IDEA DOES NOT REQUIRE THE DISTRICT TO PROVIDE SERVICES AT KDM's PRIVATE SCHOOL

Plaintiff cross-appealed, contending that the IDEA requires the District to provide KDM with services on site at Harbor Baptist. While the IDEA requires states to provide some measure of special education and related services to disabled children in private schools, *see* 20 U.S.C.A. § 1412(a)(10)(A) and (C) (Supp.1998); *see also* 34 C.F.R. §300.403-.452, since its amendment in 1997, the act has specifically provided that "[s]uch services may be provided to children with disabilities on the premises of private, including parochial, schools, to the extent consistent with law." 20 U.S.C.A. § 1412(a)(10)(A)(i)(II) (emphasis added). Every circuit that has considered whether the IDEA as amended in 1997 requires services to be provided on site at a private school has concluded it does not. *See Foley v. Special Sch. Dist.*, 153 F.3d 863, 865 (8th Cir. 1998) ("Clare and her parents now have no individual right under IDEA to the special education and related services in question, so they have no right to a federal court decree mandating that those services be provided at a particular location."); *Russman v. Board of Educ.*, 150 F.3d 219, 221-22 (2d Cir. 1998) ("[S]tates are required to provide to children voluntarily enrolled in private schools only those services that can be purchased with a proportionate amount of the federal funds received under the program. . . . [The] statute does not require a school district to provide on-site services to a disabled child who is voluntarily enrolled in private school."); *Fowler v. Unified Sch. Dist. No. 259*, 128 F.3d 1431, 1436-37 (10th Cir.1997) ("[T]he [school district's] sole obligation is to spend on such students. . . 'a proportionate amount of Federal funds,'. . ."); *K.R. v. Anderson Community Sch. Corp.*, 125 F.3d 1017, 1018 (7th Cir. 1997) (affirming prior decision, 81 F.3d 673 (7th Cir.1996), that the IDEA does not require provision of services at a private school), *cert. denied*, 523 U.S. 1046, 118

S.Ct. 1360, 140 L.Ed.2d 510 (1998); *Cefalu v. East Baton Rouge Parish Sch. Bd.*, 117 F.3d 231, 233 (5th Cir.1997) ("We therefore hold unambiguously that the defendants were not legally obligated to provide an on- site sign language interpreter to the plaintiff at the private school."). We agree with those courts and conclude that the district court properly declined to grant plaintiff relief under the IDEA.

III. THE OREGON REGULATION AS APPLIED DOES NOT VIOLATE THE FEDERAL CONSTITUTION

A. The Free Exercise Clause

The narrow question before us is whether the free exercise rights of KDM and his parents were impermissibly burdened by the application of Oregon's regulation, which precludes the District from providing special education services to KDM at the sectarian school he attended. In deciding that question we are guided by the distinction the Supreme Court has recognized in the Establishment Clause context between a statute's invalidity on its face and its invalidity in particular applications. *See Bowen v. Kendrick*, 487 U.S. 589, 602, 108 S.Ct. 2562, 101 L.Ed.2d 520 (1988); *see also Hunt v. McNair*, 413 U.S. 734, 742, 93 S.Ct. 2868, 37 L.Ed.2d 923 (1973) (examining only "the transaction presently before [the court]" and not "the statute as a whole"); *Zobrest v. Catalina Foothills Sch. Dist.*, 963 F.2d 1190, 1194 n.3 (9th Cir. 1992) (considering "only the validity of one very specific proposed application of the statutes at issue"), *rev'd on other grounds*, 509 U.S. 1, 113 S.Ct. 2462, 125 L.Ed.2d 1 (1993). Whatever the impact of the regulation might be in other factually distinct situations, *cf. Zobrest*, 963 F.2d at 1192 (failure to provide sign-language interpreter in the classroom for plaintiff effectively forced his parents to choose between foregoing a sectarian education or paying for the cost of the interpreter themselves) and *Peter v. Wedl*, 155 F.3d 992 (8th Cir. 1998) (failure to provide spastic quadriplegic student with needed fulltime paraprofessional while in school forced

choice between foregoing sectarian education or paying for the paraprofessional), this is not a case in which the regulation impinges on plaintiffs' free exercise rights. The parties stipulated that the service provided to KDM at the fire hall down the street from the school twice a week for ninety minutes is in compliance with KDM's statutory individualized education plan, the adequacy of which is not in dispute, and that he could safely travel there-indeed, the vision specialist comes to KDM's school, picks him up and then returns him to his school. Moreover, plaintiffs have stipulated that the vision specialist's services would not be provided in-class at Harbor Baptist but in a separate room. Thus, there is no support for the district court's finding that the regulation forces KDM and his parents to choose between enrolling at Harbor Baptist and receiving special education at the fire hall or enrolling at a nonreligious school and receiving in-class services. In sum, there is no showing that application of the regulation to KDM's case burdens KDM's or his parents' free exercise of their religion.

While the Oregon regulation is not "neutral" because it restricts the provision of services to "religiously-neutral settings," *cf. Employment Division v. Smith*, 494 U.S. 872, 878, 110 S.Ct. 1595, 108 L.Ed.2d 876 (1990), as applied here it does not have "the object or purpose . . . [of] suppression of religion or religious conduct." *Church of The Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 533, 113 S.Ct. 2217, 124 L.Ed.2d 472 (1993). KDM is not subjected to "[o]fficial action that targets religious conduct for distinctive treatment." *Id.* at 534, 113 S.Ct. 2217. His case is wholly unlike *Brown v. Borough of Mahaffey*, 35 F.3d 846 (3d Cir. 1994), involving the deliberate installation by the city of a gate impeding access to a particular revival meeting, or *Hartmann v. Stone*, 68 F.3d 973 (6th Cir. 1995), involving an Army regulation banning all religious practice by day care providers on the base. Nor is *Peter v. Wedl* analogous because under the facts of that case, as noted, plaintiff indeed was

forced to choose between enrolling in the sectarian school or receiving services essential to his ability to attend school. 155 F.3d at 1001.

That the regulation, standing alone, "discriminates" against students in religious schools, i.e., treats them differently by denying them state services on the school grounds, does not result in a burden on the free exercise of religion by someone in the position of KDM or his parents. We agree with the court in *Strout v. Albanese*, 178 F.3d 57 (1st Cir. 1999), cert. denied,——U.S.——, 120 S.Ct. 329,——L.Ed.2d—— (1999), upholding, against a Free Exercise challenge, a Maine statute funding grants to private schools for students in communities without public education facilities, provided the schools are nonsectarian. The court distinguished *Lukumi* because there was no evidence of "a substantial animus . . . that motivated the law in question." *Id.* at 65. Here, the District's solicitousness in accommodating KDM could hardly be said to reflect a purpose to "suppress[] religion or religious conduct." The mere fact that the District makes its service to KDM available in the fire hall down the street from his school does not amount to suppression of religion or religious conduct.

We conclude that Oregon's regulation as applied to KDM and his parents does not impose an impermissible burden on their free exercise of religion.

B. The Establishment Clause

The district court also found that the Oregon regulation violates the Establishment Clause because it requires the State Superintendent of Education to decide on a case-by-case basis whether particular settings are religious. Since *Zobrest*, the mere presence of a public employee on religious premises clearly is not enough to invoke the Establishment Clause. *See Zobrest*, 509 U.S. at 13, 113 S.Ct. 2462; *see also Agostini v. Felton*, 521 U.S. 203, 234, 117 S.Ct. 1997, 138 L.Ed.2d 391

(1997) ("[A]fter *Zobrest* we no longer presume that public employees will inculcate religion simply because they happen to be in a sectarian environment.").

In *Agostini*, the Supreme Court held that monthly visits by supervisors to parochial school classrooms to ensure that remedial education provided by public school teachers remained secular did not result in excessive entanglement under the test of *Lemon v. Kurtzman*, 403 U.S. 602, 612-13, 91 S.Ct. 2125, 29 L.Ed.2d 745 (1971). *Agostini* is merely the latest in a line of cases rejecting an entanglement claim when applied to the making of judgments by officials overseeing regulatory schemes concerning the religious character of activities. *See Hernandez v. CIR*, 490 U.S. 680, 696-97, 109 S.Ct. 2136, 104 L.Ed.2d 766 (1989) ("[R]outine regulatory interaction which involves no inquiries into religious doctrine, . . . and no 'detailed monitoring and close administrative contact' between secular and religious bodies, does not of itself violate the nonentanglement command." (citations omitted)); *Mueller v. Allen*, 463 U.S. 388, 403, 103 S.Ct. 3062, 77 L.Ed.2d 721 (1983) (finding no entanglement despite the fact that state officials required to determine whether textbooks were religious); *Board of Educ. v. Allen*, 392 U.S. 236, 245, 88 S.Ct. 1923, 20 L.Ed.2d 1060 (1968) (same).

We conclude that the regulation does not offend the entanglement prong of the *Lemon* test. We need go no further because the district court did not determine that it offended the first (secular purpose), or second (primary effect to advance or inhibit religion), prong of the test.

C. The Equal Protection Clause

The district court held that the regulation violates the Equal Protection Clause because it "has the effect of allowing in-class services to disabled students at non-religious schools while prohibiting in-class services to disabled students at

religious schools, both public and private. . . . Absent an anti-establishment interest, however, such a distinction lacks a rational, let alone compelling, justification." Because parochial school students are not a suspect class, scrutiny of their treatment by the state is under the rational basis test. *See City of New Orleans v. Dukes*, 427 U.S. 297, 303-04, 96 S.Ct. 2513, 49 L.Ed.2d 511 (1976); *Zobrest*, 963 F.2d at 1197 n.6. While under *Zobrest* the federal Establishment Clause raises no bar to providing on-site services to disabled students at sectarian schools, for purposes of equal protection analysis, Oregon's interpretation of its constitutional separation requirement remains a legitimate state interest. The parties stipulated that "[t]he State of Oregon interprets Article I, § 5, of its constitution to require the provision of special education and related services in a religiously-neutral setting." *See* Or. Const. art. I, § 5; *Lowe v. City of Eugene*, 254 Or. 518, 463 P.2d 360, 364 (1969) (describing art. I, § 5 as an expression of Oregon's commitment to the doctrine of separation of church and state); *see also Cooper v. Eugene Sch. Dist. No. 4J*, 301 Or. 358, 723 P.2d 298, 312 (1986) (upholding Oregon state statute prohibiting school teacher from wearing religious dress while on duty, finding religious garb incompatible "with the school's commitment to maintaining . . . the atmosphere of religious freedom and neutrality. . .".); *Strout*, 178 F.3d at 67 ("The Maine legislature rationally could have believed that including sectarian schools within its funding scheme would or might violate the establishment clause." (Campbell, J., concurring)); *Luetkemeyer v. Kaufmann*, 364 F.Supp. 376, 382 (W.D.Mo. 1973), aff'd, 419 U.S. 888, 95 S.Ct. 167, 42 L.Ed.2d 134 (1974) (finding no equal protection violation by Missouri's denial of bus service to parochial school student because of state's legitimate interest in maintaining separation of church and state). We conclude that

KDM and his parents have not been denied the equal protection of the laws.[4]

CONCLUSION

The judgment is REVERSED.

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[4] In *Zobrest*, moreover, we rejected an equal protection claim on the ground that the Free Exercise Clause does not create a fundamental right to on-site special education services. *See Zobrest*, 963 F.2d at 1196 n. 6; *see also Norwood v. Harrison*, 413 U.S. 455, 461-62, 93 S.Ct. 2804, 37 L.Ed.2d 723 (1973) (denial of public funds to private schools not an equal protection violation). Although this court's judgment in *Zobrest* was reversed on the Establishment Clause ground, the Free Exercise portion of the opinion remains intact. *See Chas. Wolff Packing Co. v. Court of Indus. Relations*, 267 U.S. 552, 562, 45 S.Ct. 441, 69 LEd. 785 (1925) (quoting *Mutual Life Ins. Co. v. Hill*, 193 U.S. 551, 553-54, 24 S.Ct. 538, 48 L.Ed. 788 (1904) ("[A] judgment of reversal is not necessarily an adjudication by the appellate court of any other than the question in terms discussed and decided.")).

KLEINFELD, Circuit Judge, dissenting:

Under today's decision, the government may discriminate against people based on their exercise of religion, so long as the discriminatory burdens it imposes are not more substantial than requiring a blind child with cerebral palsy to leave his school building and go down the street to a fire hall. That is quite a surprise. Fortunately, that is not the law in most of the rest of the country. The Supreme Court,[1] and the Third,[2] Sixth,[3] and Eighth[4] Circuits have all held to the contrary—the Eighth Circuit in a case materially identical to this one. Unfortunately, that will be the law in this circuit, if the majority opinion stands.

The reason that the majority gets the wrong answer is that it asks the wrong question. The majority formulates the question in this case as whether the regulation requiring special education to be provided in "a religiously-neutral setting" [5] imposes "an impermissible burden on [KDM's and his parents'] free exercise of religion." Because going down the street to the fire hall is only a slight inconvenience, the majority concludes that the government may burden religion to this extent, even though a student with the same afflictions in a private secular school would not have to go down the street to the fire hall for his special education services. As for why treating children in religious schools differently does not violate the Equal Protection Clause, the majority says that because religious school students are not a "suspect class," a

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[1] *Church of Lukumi Babalu Aye, Inc. v. Hialeah*, 508 U.S. 520, 113 S.Ct. 2217, 124 L.Ed.2d 472 (1993).

[2] *Brown v. Borough of Mahaffey*, 35 F.3d 846 (3d Cir. 1994).

[3] *Hartmann v. Stone*, 68 F.3d 973 (6th Cir. 1995).

[4] *Peter v. Wedl*, 155 F.3d 992 (8th Cir. 1998).

[5] Or. Admin. R. 581-15-166(3).

rational basis for the distinction is enough, and Oregon's desire to avoid religiosity in education, in order to avoid anything that might amount to an establishment of religion, is a rational basis.

The technical reason why the majority's formulation is wrong is that the majority asks a question developed in cases involving neutral laws of general applicability, even though, as the majority concedes, this case involves a non- neutral law. The substantial burden test has only been applied to free exercise challenges of neutral and generally applicable laws, and it survives *Employment Division v. Smith*,[6] if at all, only where "a neutral, generally applicable regulatory law" [7] implicates a combination of the Free Exercise Clause and another constitutional right, such as "the right of parents . . . to direct the education of their children." [8] The regulation at issue here is not neutral on its face. By requiring a "religiously-neutral setting," the government expressly and intentionally discriminates against religious as opposed to secular private schools. Oregon could lawfully provide the services only in public and not in private schools. But having decided to provide the services in private schools, Oregon cannot discriminate against religious schools without violating the Constitution.

When the government, by a law not neutral on its face, treats people of one or all religions better or worse than others, the constitutional question is traditionally formulated so that the answer has to be "No!" *Church of Lukumi Babalu Aye, Inc. v. Hialeah*[9] states the test we are required to apply to

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[6] *Employment Div. v. Smith*, 494 U.S. 872, 110 S.Ct. 1595, 108 L.Ed.2d 876 (1990).

[7] *Id.* at 880, 110 S.Ct. 1595.

[8] *Id.* at 881, 110 S.Ct. 1595.

[9] *Church of Lukumi Babalu Aye, Inc. v. Hialeah*, 508 U.S. 520, 113 S.Ct. 2217, 124 L.Ed.2d 472 (1993).

non-neutral laws such as Oregon's special education regulation. Such a law gets "the most rigorous of scrutiny," must advance " 'interests of the highest order,' " and must be "narrowly tailored."[10] That test, of course, is generally too stringent for any law to pass. Few laws singling out a particular religion or religion in general for special burdens, even slight burdens, can satisfy this test.

The law at issue in this case, requiring special education to be provided in "a religiously-neutral setting,"[11] violates KDM's rights under the Free Exercise and Equal Protection Clauses. Handicapped children at secular private schools get special education in their schools, but handicapped children at religious private schools must leave school to get the same special education. This law violates the Constitution because it distinguishes between people and burdens some of them on account of their religious practices.

The majority puts us at odds with three other circuits to have considered analogous issues. In the rare cases where states have burdened religion, even insubstantially, by laws that are not neutral, courts have almost uniformly held the laws unconstitutional. The only circuit to have considered the proposition that today's majority adopts, that plaintiffs must show a "substantial" or "impermissible" burden for a Free Exercise challenge, has rejected the proposition.

In *Brown v. Borough of Mahaffey,* [12] a municipality erected a gate on public land to obstruct travel through a park to revival services held on adjacent private land. Alternate access was available, and the obstruction was but a slight additional burden for those going to the revival. The Third Circuit rejected the municipality's argument that the plaintiffs

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[10] *Id.* at 546, 113 S.Ct. 2217.

[11] Or. Admin. R. 581-15-166(3).

[12] *Brown v. Borough of Mahaffey*, 35 F.3d 846, 849 (3rd Cir. 1994).

had failed to show that the gate imposed a substantial burden and held that "[t]he rare cases which address acts or laws which target religious activity have never limited liability to instances where a 'substantial burden' was proved by the plaintiff." [13] The court explained that "[t]he 'substantial burden' requirement was developed in the Supreme Court's free exercise jurisprudence . . . in order to balance the tension between religious rights and valid government goals advanced by 'neutral and generally applicable laws' which create an incidental burden on religious exercise." [14] "Because government actions intentionally discriminating against religious exercise *a fortiori* serve no legitimate purpose, no balancing test is necessary to cabin religious exercise in deference to such action."[15]

Similarly, in *Hartmann v. Stone*,[16] an army regulation forbid on-base child-care providers from using "[r]eligious materials or activities specifically designed to teach or promote religious doctrine." [17] The Sixth Circuit held that because the regulation was not neutral and generally applicable, it had to be narrowly tailored to serve a compelling state interest; it was not, so the Sixth Circuit held that the Army Regulation violated the Free Exercise Clause. The court expressly rejected the proposition, accepted by today's majority, that a state's desire to assure the fullest compliance with the Establishment Clause was a sufficiently compelling interest to save the regulation.

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[13] *Id.* at 850.

[14] *Id.*

[15] *Id.*

[16] *Hartmann v. Stone*, 68 F.3d 973, 979 (6th Cir. 1995).

[17] *See id.* at 977.

Peter v. Wedl [18] is materially identical to the case we decide today, yet the Eighth Circuit reaches the opposite conclusion from today's majority. In *Peter*, a Minnesota school district rule prohibited special education services from being provided except in religiously "neutral" schools, whether private or public.[19] The Eighth Circuit held that the rule violated the Free Exercise, the Free Speech, and the Equal Protection Clauses. "Government discrimination based on religion violates the Free Exercise Clause of the First Amendment." [20] Like the Sixth Circuit in *Hartmann*, the Eighth Circuit expressly rejected Minnesota's argument that the law was constitutionally valid because of the state's interest in assiduous compliance with the Establishment Clause.

The majority has not offered any persuasive distinction between this case and the Supreme Court decision in *Lukumi* or the Third, Sixth, and Eighth Circuit decisions. The majority says *Lukumi* does not apply here because Oregon's regulation does not have as its object suppression of religion or religious conduct. I am not sure why the majority thinks this is the right question to ask—government discrimination against one or all religions is unconstitutional even if suppression is not the object. "At a minimum, the protections of the Free Exercise Clause pertain if the law at issue discriminates against some or all religious beliefs. . . ." [21] Even if the extent of the burden mattered (which it does not because the Oregon regulation is not neutral toward religion), the exercise of religious convictions is substantially burdened here. Religions have commanded for at least three millennia

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[18] *Peter v. Wedl*, 155 F.3d 992 (8th Cir. 1998).

[19] *See id.* at 994.

[20] *Id.* at 995.

[21] *Lukumi*, 508 U.S. at 532, 113 S.Ct. 2217.

that parents educate their children in their religious beliefs. "Therefore impress these My words upon your very heart: bind them as a sign on your hand and let them serve as a symbol on your forehead, and teach them to your children. . ." [22] Under Oregon's regulation, if a blind child with cerebral palsy goes to a secular private school, he gets special education in his school, but if he goes to a religious private school, he has to take a trip down the street for special education. The Free Exercise Clause entitles people to live their lives in accord with their religious beliefs, not just to say their prayers, without having the government intentionally discriminate against them for doing so.

The majority attempts to limit *Lukumi* to situations where there is evidence that substantial animus to repress religion motivated the law in question. That is a misreading. *Lukumi* considered the anti-Santeria animus that motivated an arguably facially neutral law against animal sacrifice as a basis for treating the law as non-neutral. The Court held that "[f]acial neutrality is not determinative . . . . [because t]he Free Exercise Clause, like the Establishment Clause, extends beyond facial discrimination." [23] Facial discrimination, on the other hand, is almost always determinative. "The Free Exercise Clause protects against governmental hostility which is masked as well as overt." [24] Once there is a non-neutral law, as the majority has conceded that we have here, the test under *Lukumi* is clear—"a law restrictive of religious practices must advance 'interests of the highest order' and must be narrowly tailored in pursuit of those interests." [25] "Animus" reclassifies a facially neutral law as one that targets

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[22] Deuteronomy 11:18-19 (emphasis added).

[23] *Lukumi*, 508 U.S. at 534, 113 S.Ct. 2217.

[24] *Id.*

[25] *Id.* at 546, 113 S.Ct. 2217.

religion. "Animus" is immaterial here because the law at issue is not facially neutral, but treats people differently according to whether their school is religious.

The majority fails to adequately distinguish the Third, Sixth, and Eighth Circuit decisions. The majority claims to distinguish *Brown* on the ground that it involved the deliberate burdening of a religious exercise, but that distinction is false; the Oregon regulation at issue here intentionally distinguishes between religious and "religiously-neutral" private schools. That is a deliberate burdening of one, and a benefitting of the other. The majority says *Hartmann* involved a regulation "banning all religious practices by day care providers on the base," but does not say why this should be distinguished from banning all special education services in religious settings. They are the same for this purpose. The majority's attempt to distinguish *Peter* makes no sense because, there, as here, the regulation allowed special education services only at a religiously "neutral site." [26] The majority purports to rely on a fact that was irrelevant to the Eighth Circuit's holding, and quotes only from dictum on an alternative argument that the Eighth Circuit did not reach.[27] That case and this one are, for analytic purposes, carbon copies.

There is no such thing as a *de minimis* exception to the Equal Protection Clause.[28] The government cannot discriminate against people because of their religion, even where the burden it imposes for that reason is only what the majority considers a slight inconvenience. And there is no such thing as a *de minimis* exception to the Establishment

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[26] *Id.* at 994.

[27] *See id.* at 1001.

[28] *Monterey Mechanical Co. v. Wilson*, 125 F.3d 702, 712 (9th Cir. 1997).

Clause. *Lee v. Weisman*[29] holds that the "embarrassment and the intrusion of the religious exercise cannot be refuted by arguing that [a clergyman's] prayers [at a public school graduation ceremony], and similar ones to be said in the future, are of a *de minimis* character." [30] It follows that there is also no such thing as a *de minimis* exception to the Free Exercise Clause.

The government can no more discriminate against religion in general than against a particular religion. The claimed interest of Oregon, on which today's majority relies, "in achieving greater separation of church and State than is already ensured under the Establishment Clause of the Federal Constitution—is limited by the Free Exercise Clause. . . ." [31] The school would not violate the Establishment Clause by providing the special education services to the handicapped child in this case, which it provides generally to all children in their public or private schools, in his religious school.[32] To the extent that Oregon bases the "religiously-neutral setting" regulation on a "better safe than sorry" approach to the Establishment Clause, the Free Exercise Clause prevents the government from making itself safe from Establishment

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[29] *Lee v. Weisman*, 505 U.S. 577, 112 S.Ct. 2649, 120 L.Ed.2d 467 (1992).

[30] *Id.* at 594, 112 S.Ct. 2649.

[31] *Widmar v. Vincent*, 454 U.S. 263, 276, 102 S.Ct. 269, 70 L.Ed.2d 440 (1981). *Cf. Rosenberger v. Rector and Visitors of Univ. of Va.*, 515 U.S. 819, 846, 115 S.Ct. 2510, 132 L.Ed.2d 700 (1995) ("There is no Establishment Clause violation in the University's honoring its duties under the Free Speech Clause."); *Lamb's Chapel v. Center Moriches Union Free School District*, 508 U.S. 384, 394, 113 S.Ct. 2141, 124 L.Ed.2d 352 (1993) (rejecting compelling state interest in avoiding Establishment Clause violation).

[32] *Zobrest v. Catalina Foothills School District*, 509 U.S. 1, 113 S.Ct. 2462, 125 L.Ed.2d 1(1993).

Clause challenges by making adherents of religion sorry. The "First Amendment forbids an official purpose to disapprove of a particular religion or of religion in general." [33] The Constitution mandates "neutrality between religion and non-religion." [34] "Withholding access would leave an impermissible perception that religious activities are disfavored." [35] Discriminating against religious schools in a program of otherwise general availability makes no sense as a strategy for avoiding an establishment of religion, because "treating everyone the same without regard to religion is hard to see as 'establishing' anything—except equality." [36]

One traditional test of the correctness of a legal proposition is to apply it to a case where we can be confident of the right answer, and see whether the proposition yields the wrong answer. We do the same thing to test a spreadsheet, by entering data where we know what the answer should be to see if the spreadsheet properly generates it. The majority today concludes that so long as the practice of religion is not more substantially burdened than requiring a blind child with cerebral palsy to leave his school building and go down the street for special education services, the government may treat that child less favorably than others on account of his religion. Will this rule yield the right answer if applied to something we would all agree was outrageous, say a government requirement that all Jews wear armbands displaying stars of David? I am confident that today's majority would be as appalled as I am by such a law and would hold it unconstitutional, but it would be hard for the

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[33] *Lukumi*, 508 U.S. at 532, 113 S.Ct. 2217.

[34] *Hartmann*, 68 F.3d at 978.

[35] *Rosenberger*, 515 U.S. at 846, 115 S.Ct. 2510 (O'Connor, concurring) (summarizing the principle of neutrality toward religion).

[36] Eugene Volokh, Equal Treatment Is Not Establishment, 13 Notre Dame J.L. Ethics & Public Policy 341, 345 (1999).

majority to get the right result from its holding in this case. The majority holds today that a law may impose a discriminatory burden on religion, so long as there is a rational purpose for the law and the burden is no greater than requiring a blind child with cerebral palsy to leave his school and go down the street for special education services. The physical burden of wearing the armband is far less. The historical associations with the armband are horrifying, but our government would doubtless have a more beneficient purpose and could articulate some rational basis, perhaps implementation of some public safety or antidiscrimination program. The hypothetical case could be modified to soften the historical association by positing a law requiring adherents of all religions to wear armbands announcing their faiths. Today's majority says the only question is whether the special imposition on religion "impermissibly burden[s] . . . the free exercise rights of KDM and his parents." That cannot be so. Most religions allow their adherents to wear and display symbols of the faith, but that does not entitle the government to require such displays. As the armband example makes clear, and as *Lukumi* makes explicit, that is not the only question. Although the Oregon law imposes no stigma comparable to the armbands, children must learn from the Oregon regulation that their government regards religious schools as bad in some way, places in which it will not deign to provide services available in all other public and private schools, like the "impermissible" perception that religious activities are disfavored in *Rosenberger*.

The Free Exercise Clause prohibits government anti-clericalism as vigorously as the Establishment Clause prohibits government from preferring a particular religion. Our revolution, unlike, say, the French, Mexican, or Russian, evinced no hostility to any organized religion. Our founding manifesto, the Declaration of Independence, says that people are "endowed by their Creator" with their fundamental rights. The Establishment Clause and the Free Exercise Clause are

not in tension, as though one said people can practice their religion, and the other said "but not in public." The Free Exercise and Establishment Clauses complement each other, both advancing the purpose of freedom of religion. One guarantees individuals the right to freely exercise their religion, and the other assures that this free exercise will be unburdened by government preference for a different religion.[37] Americans are entitled to a government that does not discriminate against them because of their religion, even with burdens that those who do not bear them see as merely a slight inconvenience.

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[37] *See* Michael W. McConnell, Religious Freedom at a Crossroads, 59 U. Chi. L. Rev. 115, 117 (1992).

APPENDIX C

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

[Filed Jan 5, 1998]

Civil No. 96-6075-HO

WJM, on behalf of KDM, a minor,
Plaintiff,

v.

REEDSPORT SCHOOL DISTRICT and NORMA PAULUS,
Defendants.

JUDGMENT

The decision of the Superintendent is reversed and judgment is entered in favor of Plaintiff on counts three and four of his complaint. Plaintiff is entitled to reasonable attorney fees.

Donald M. Cinnamond. Clerk

/s/ Lea Force
LEA FORCE
Deputy

Dated: January 5, 1998

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

[Filed Dec 18, 1997]

Case No. 96-6075-HO

K.D.M., a minor, by and through his father and next friend, W.J.M.,

Plaintiff,

v.

REEDSPORT SCHOOL DISTRICT and NORMA PAULUS, in her official capacity as Oregon Superintendent of Public Instruction,

Defendants.

ORDER

This is an action challenging the Oregon Superintentdent of Public Instruction's decision that plaintiff's son K.D.M. is not entitled to training by a vision specialist on K.D.M.'s parochial school campus. The Individuals with Disabilities Education Act gives this court jurisdiction and the obligation to review the Superintendent's decision *de novo*. *See* 20 U.S.C. § 1415 (e) (2) (1995).

FACTS

Plaintiff's son K.D.M. is a minor who is legally blind and has cerebral palsy. K.D.M. attends Harbor Baptist Church School, a private religious school in Winchester Bay, Oregon. Defendant Reedsport School District (The District) provides K. D. M. with braillers, computers, and other special equipment at Harbor Baptist. The District supplies K.D.M. with a vision specialist at the fire hall down the street. Plaintiff receives assistance from the vision specialist for 90 minutes

twice weekly. Plaintiff concedes it is safe for K.D.M. to travel to and from the fire hall but contends the fire hall is not an appropriate educational environment.

Plaintiff seeks an injunction requiring defendants to provide the vision specialist's services at Harbor Baptist. Plaintiff agrees that it could be disruptive to allow the vision specialist to provide services to plaintiff in the regular classroom but suggests that a separate classroom at Harbor Baptist be used to provide the specialized instruction.

Oregon Administrative Rule 581-15-166 took effect May 25, 1995. It provides:

> Public Educational Agency Responsibility for Children Placed by Parents in Private Schools
>
> * * *
>
> (2) If a child with a disability, who is at the age of eligibility for kindergarten through age 21, is offered a free appropriate public education by the child's resident school district and the parent of the child unilaterally enrolls the child in a private school, the child shall not have an individual entitlement to receive special education and related services from the child's resident school district. Consistent with the procedures set forth in OAR 581-150-171, resident school districts shall determine which children with disabilities shall receive services, what services shall be provided and how those services shall be provided, including the location for the delivery of those services.
>
> (3) Such special education and related services shall be provided in a religiously-neutral setting.

The District concedes it is not providing the services of a vision specialist at Harbor Baptist because it and the State of Oregon believe Harbor Baptist is not a religiously-neutral setting.

DISCUSSION

The Individuals with Disabilities Education Act (IDEA) provides federal funding to states which comply with certain conditions. One condition is that the state provide educational services in the "[l]east restrictive environment":

> To the maximum extent appropriate, children with disabilities, including children in private institutions or other care facilities, are educated with children who are not disabled, and special classes, separate schooling, or other removal of children with disabilities from the regular educational environment occurs only when the nature or severity of the handicap is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.

20 U.S.C. § 1412 (5) (A) (1997).

A provision titled "Children in private schools" requires states to provide some degree of special education and related services to disabled children enrolled in private schools:

> [(A) (i)] To the extent consistent with the number and location of children with disabilities in the State who are enrolled by their parents in private elementary and secondary schools, provision is made for the participation of those children in the program assisted or carried out under this subchapter by providing for such children special education and related services in accordance with the following requirements, ...
>
> (I) Amounts expended for the provision of those services by a local educational agency shall be equal to a proportionate amount of Federal funds made available under this subchapter.
>
> (II) Such services may be provided to children with disabilities on the premises of private, including parochial, schools, to the extent consistent with law.

Under the 1997 amendments to the IDEA, however, the state's obligation to pay for services to children in private schools is limited:

> [(C) (i) Subject to subparagraph (A), this subchapter does not require a local educational agency to pay for the cost of education, including special education or related services, of a child with a disability at a private school or facility if that agency makes a free appropriate public education available to the child and the parents elected to place the child in such private school or facility. . . .

20 U.S.C. § 1412(a) (10).

According to the House Committee Report, the IDEA, as amended, is intended to provide, "to the extent consistent with law, at State discretion, the provi[sion of] services on the premises of private, including parochial, schools." H.Rep. Comm. on Education and the Work Force No. 95, 105th Cong. 1st Sess. 1, 91 (May 13, 1997).

Defendants argue that they have met their obligations under the IDEA by offering K.D.M. a free and appropriate public education, and, therefore, they do not need to provide K.D.M. with an in-class vision specialist. Defendants rely in large part on *Goodall by Goodall v. Stafford Cty. Sch. Bd.*, 930 F.2d 363 (4th Cir. 1991), *K.R. by M.R. v. Anderson Comm. Sch. Corp.*, 125 F. 3d 1017 (1997), and *Fowler v. Unified Sch. Dist. No. 259*,——F.3d——, 1997 WL 686039 (10th Cir. 1997). The Tenth Circuit Court of Appeals held in *Fowler* that, under the 1997 IDEA amendments, a school district is not required to provide special education services on a disabled student's parochial school campus if the district has offered that student a free and appropriate public education. *Fowler* at *5. The Seventh Circuit reached essentially the same holding in *Anderson*, but with respect to a disabled student in a private, non-sectarian school.

Anderson, at 1019. Neither *Fowler* nor *Anderson* involved an express or *de facto* state policy which, like OAR 581-15-166, restricted services to non-religious settings. Accordingly, those cases did not address the constitutional concerns relevant here.

The Second Circuit Court of Appeals in *Goodall* and the Ninth Circuit Court of Appeals in *Zobrest v. Catalina Foothills Sch. Dist.*, 963 F.2d 1190 (9th Cir. 1992) did address the Free Exercise implications of a school district's denial of services to disabled children enrolled in parochial schools. All three judges on the Ninth Circuit panel agreed that the school district's denial of services on the student's parochial school campus imposed a burden on the student's and his parents' rights under the Free Exercise clause of the First Amendment to the United States Constitution.[1] *Zobrest*, at 1196 (Fletcher, J., joined by Rheinhardt, J.), 1205 (Tang, dissenting). Both *Zobrest* and the *Goodall* court, however, held that any impingement on the child or parents' Free Exercise rights was justified by the state's interest in avoiding an Establishment Clause violation. *Zobrest*, 963 F.2d at 1196-97; *Goodall*, 930 F.2d at 369-70.

The United States Supreme Court granted the Zobrests' petition for a writ of certiorari and reversed the Ninth Circuit's decision. *Zobrest v. Catalina Foothills Sch. Dist.*, 113 S.Ct. 2462, 2469 (1993). The Supreme Court held that the Establishment Clause of the United States Constitution does not prevent a school district from furnishing a sign language interpreter in a disabled student's parochial school. *Id.* The Court did not reach the *Zobrests'* Free Exercise claim

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[1] The First Amendment provides:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

because the Zobrests did not challenge that part of the decision. *Id.* at 2465 n.5.

While defendants argue that *Zobrest* merely establishes that a school district may provide special education on parochial campuses, not that it is required to do so, the Court's decision in *Zobrest* reaches further than defendants suggest in that it undercuts the courts of appeals' Free Exercise reasoning in both *Goodall* and *Zobrest*: absent an Establishment Clause violation, there remains no compelling reason to violate the student and his parents' Free Exercise rights. Like the policy addressed in *Zobrest*, OAR 581-15-166 imposes a burden on K. D. M.'s and his parents' free exercise rights by forcing them to choose between enrolling at Harbor Baptist and receiving special education at the fire hall or enrolling at a non-religious school and receiving in-class services. Under United States Supreme Court precedent, neither federal nor state anti-establishment concerns justify such an intrusion. *See Widmar v. Vincent*, 454 U.S. 263, 275-76 (1981) (antiestablishment concerns arising out of state constitution are limited by Free Exercise clause); *see also Zobrest*, 963 F.2d at 1205 (Tang, J., dissenting); *Everson v. Bd. of Educ.*, 330 U.S. 1 (1947). OAR 581-15-166 violates the Free Exercise clause of the First Amendment to the United States Constitution.

OAR 581-15-166 is infirm on other constitutional grounds. The Establishment Clause permits neutral state polices that have incidental effects on religious institutions, *e.g., Zobrest*, 509 U.S. at 14, but it prohibits states from engaging in activities that entail "excessive entanglement between church and state." *Agostini v. Felton* — U.S. —, 117 S. Ct. 1997, 2002 (1997). OAR 581-15-166 imposes an obligation on the Superintendent to decide, on a case by case basis, whether particular settings are religious. If an education site-be it a fire house, home school, or private school-contains a Menorah on a table, a Psalm on the wall, a nativity scene in

the corner, or the complete works of L. Ron Hubbard on a shelf, OAR 581-15-166 would require a state administrator to decide whether that setting is "religious" and, therefore, qualified for educating disabled students. In trying to keep church and state at arm's length, OAR 581-15-166 runs the risk of promoting head-on collisions.

OAR 581-15-166 also implicates the Equal Protection clause of the United States Constitution. Though defendants argue the regulation distinguishes on the basis of "settings," it can hardly be denied that OAR 581-15-166 has the effect of allowing in-class services to disabled students at non-religious schools while prohibiting in-class services to disabled students at religious schools, both public and private. The Ninth Circuit held in *Zobrest* that the Equal Protection clause permits such a distinction in light of the state's interest in avoiding an Establishment clause violation. Absent an anti-establishment interest, however, such a distinction lacks a rational, let alone compelling, justification.[2]

In addition to a declaration that OAR 581-15-166 is unconstitutional, plaintiff seeks specific enforcement of his right to a vision specialist in a Harbor Baptist classroom. Defendants are enjoined from enforcing OAR 581-15-166 and from following a policy of providing special education and related services to disabled students at religious schools on different terms than provided to disabled students at non-religious schools. As long as defendants provide IDEA

---

[2] While the Ninth Circuit in *Zobrest* applied rational basis scrutiny, the existence of a fundamental Free Exercise right may warrant a compelling interest standard. The higher standard may also be warranted by the amalgamation of equal protection and substantive due process rights. *See Zobrest* 494 U.S. at 881-82; *see also Pierce v. Soc'y of Sisters*, 268 U.S. 510 (1925) (recognizing the right of parents and guardians to direct their children's education).

Defendants have not suggested any justification aside from Oregon's anti-establishment concerns.

benefits on such a basis, however, neither the IDEA nor the United States or Oregon constitutions impose an obligation to provide a vision specialist to K.D.M. While the IDEA mandates a regular educational environment "to the maximum extent appropriate," its recent amendments make clear that a district's provision of services is not required if a parent opts out of a free and appropriate public education. Thus, a district may refuse to provide special education and related services to private school students whose parents opt out of free and appropriate public education as long as the district does not create a distinction based on religious settings and otherwise complies with the IDEA.

The court need not address plaintiff's claims under the Oregon Constitution or the Religious Freedom Restoration Act. Because there is no evidence that defendant Paulus intentionally or recklessly violated plaintiff's clearly established constitutional rights, *Act Up!/Portland v. Bagley*, 988 F.2d 868 (9th Cir. 1993), plaintiff is not entitled to relief on his claim under 42 U.S.C. § 1983.

CONCLUSION

The decision of the Superintendent is reversed and judgment entered in favor of plaintiff on counts three and four of his Complaint (#1). As the prevailing party, plaintiff is entitled to his reasonable attorney fees. 20 U.S.C. § 1415 (i) (3) (B) (1997)

DATED this 18th day of December, 1997.

/s/ Michael R. Hogan
Michael R. Hogan
United States District Judge

CERTIFICATE OF SERVICE

I certify that I served the foregoing Civil Appeals Docketing Statement upon the below listed parties, on February 4th, 1998, by mailing a certified true copy with postage prepaid, to said parties at their regular mailing addresses as shown below:

Attorneys for Plaintiff

Harold B. Scoggins
Farleigh, Wada & Witt, PC
Bank of America Financial Center
121 SW Morrison Street, Suite 600
Portland, OR 97204

Timothy Harrison
GIBBS & CRAZE, P.A.
5666 Seminole Boulevard, Suite 2
Seminole, Florida 34642

Attorney for Defendant Reedsport School District

Joseph D. Robertson
GARRETT, HEMANN, ROBERTSON, PAULUS
Jennings & Comstock, PC
1011 Commercial N.E. #210
Salem, OR 97308

/s/ Philip Schradle
PHILIP SCHRADLE
Assistant Attorney General
Attorney for Defendant-Appellant
Norma Paulus

APPENDIX D

BEFORE THE SUPERINTENDENT OF PUBLIC INSTRUCTION

DOE Case # DP95-141
Ref. No. 53341

IN THE MATTER OF THE EDUCATION OF K.D.M.

v.

REEDSPORT SCHOOL DISTRICT

DATE OF HEARING REQUEST:	August 10, 1995
DATE OF HEARING:	September 11, 1995[1]
DATE OF ORDER:	Novermber 20, 1995
PLACE OF HEARING:	Salem, Oregon[2]
HEARING OFFICER:	Kim Scranton
CLAIMANT'S REPRESENTATIVE:	Charles Craze, Attorney
DIVISION REPRESENTATIVE:	Bruce Zagar, Attorney
WITNESSES:	None

ISSUE:

Shall Reedsport School District provide a vision specialist for K.M. in his classroom at Harbor Baptist Church School?

---

[1] Parties stipulated to facts. Hearing was opened only to determine due dates for submitting written briefs. Written simultaneous briefs to be postmarked by October 3.

[2] The hearing was conducted by telephone. The hearing office was located in Salem, Oregon.

FINDINGS OF FACT:

1. K.D.M., the child of B.M. and G.M., is a child of compulsory school age currently residing at 563 Elm Avenue, Reedsport, Oregon 97467, which is in the Reedsport School District (District), part of the Coos Education Service District.

2. K.D.M. is legally blind and has cerebral palsy. As such, he falls within the meaning of the term "children with disabilities" as defined in the Individuals With Disabilities Education Act (IDEA), 20 U.S.C. § 1401(a).

3. K.D.M. is entitled to receive assistance from the State of Oregon on the basis of his disability under the IDEA, and has received such assistance by means of a vision specialist and other special equipment. He has received such assistance from the District through its contract with the Coos Education Service District since he was approximately one year of age.

4. The District has not provided a vision specialist to K.D.M. in his classroom since he began attending the Harbor Baptist Church School in Reedsport, Oregon, in 1993. The Harbor Baptist Church School is a sectarian religious school.

5. The District has continued to supply K.D.M. with a vision specialist and those services have been provided at the fire hall in Winchester Bay, Oregon, across the street from the Harbor Baptist Church School, and the District has continued to supply him with braillers, computers, and other special equipment at his school. K.D.M. receives assistance at the fire hall for approximately 90 minutes, twice per week. These services by the District are in compliance with K.D.M.'s individualized education plan, the adequacy of which is not in dispute.

6. K.D.M.'s parents enrolled him in the Harbor Baptist Church School based on their sincerely held religious conviction and beliefs.

7. The vision specialist could provide services to K.D.M. in his regular classes. However, such an arrangement could prove disruptive to both K.D.M.'s instruction and the instruction of the other students. K.D.M.'S parents suggest that a separate room at the Harbor Baptist Church School be used to provide K.D.M.'s specialized instruction.

8. K.D.M. is not being provided the services of a vision specialist in his regular classroom at the Harbor Baptist Church School by the District because of the religious nature of the school. This is the sole issue in dispute.

9. Up until May 25, 1995, and at all relevant times prior to that date, the Oregon Administrative Rules promulgated by the Oregon Department of Education provided for the following:

"School District Responsibility for Children in Private Schools

581-15-166:

(1) School Districts shall make available special education designed to meet the needs of resident handicapped children in private schools. Such special education shall not be provided in the private school.

(2) School Districts shall provide such children with genuine opportunities for equitable participation in special education consistent with the number of children and their needs."

10. On May 25, 1995, with the signing of the new Oregon Administrative Rule by the Superintendent of Public Instruction, Norma Paulus, a revised rule became effective,

thus governing the conduct of the District. New OAR 581-15-166 provides as follows:

> "Public Educational Agency Responsibility for Children Placed by Parents in Private Schools
>
> (1) If a child with a disability, who is age three through the age of eligibility for kindergarten, is offered a free and appropriate public education by the Department of Education and the parent of the child unilaterally enrolls the child in a private school, the child shall not have an individual entitlement to receive special education and related services from the Department of Education and related services from the Department of Education. Consistent with the procedures set forth in OAR 581-15-171, the Department of Education shall determine which children with disabilities shall receive services, what services shall be provided and how those services shall be provided, including the location for the delivery of those services.
>
> (2) If a child with a disability, who is at the age of eligibility for kindergarten through age 21, is offered a free appropriate public education by the child's resident school district and the parent of the child unilaterally enrolls the child in private school, the child shall not have an individual entitlement to receive special education and related services from the child's resident school district. Consistent with the procedures set forth in OAR 581-15-171, resident school districts shall determine which children with disabilities shall receive services, what services shall be provided and how those services shall be provided, including the location for the delivery of those services.

(3) Such special education and related services shall be provided in a religiously-neutral setting.

(4) The Department of Education and school districts shall provide such children with genuine opportunities for equitable participation in special education consistent with the number of children and their needs."

CONCLUSIONS AND REASONS:

The governing statute applicable to the facts is the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400 *et seq.*), which was implemented by the U.S. Department of Education through regulations published at 34 C.F.R. §§ 300.1 *et seq.* The IDEA requires that all children with disabilities have available to them a free appropriate public education which emphasizes special education and related services designed to meet their unique needs (§ 1400(c)). Further, § 1412 (2) (B) requires any State desiring to qualify under this statute to demonstrate, among other things, that "a free appropriate education will be provided for all children with disabilities between the ages of three and eighteen within the State not later than September 1, 1978. . . ." 34 C.F.R. §300.452 makes it clear that "[e]ach LEA [Local Educational Agency] shall provide special education and related services designed to meet the needs of private school children with disabilities in the jurisdiction of the agency," and cites 20 U.S.C. 1413(a) (4) (A) and 1414(a)(6) as authority.

All disabled children must be provided services under the IDEA. This is true even if the parents of the child choose to send the child to a private school. Title 34 C.F.R. § 300.403 provides that if a child with a disability has a free and appropriate public education available and the parents choose to place the child in a private school or facility, the public agency is not required to pay for the child's education at the

private school facility. "However, the public agency shall make services available to the child as provided under §§ 300.450-300.452". 34 C.F.R. § 300.403.

Claimant argues that the Individuals with Disabilities Education Act requires that K.D.M.'s vision specialist and any other aid be provided in the regular educational environment. He argues that parents have a fundamental right to direct the upbringing of their children, including the right to choose the type of education they receive. Section 300.452 requires each LEA to "provide special education and related services designed to meet the needs of private school children with disabilities residing in the jurisdiction of the agency."

In Oregon, school districts must make available special education designed to meet the needs of resident handicapped children in private schools. The regulation requires special education and related services be provided in a religiously neutral setting. OAR 581-15-166(3).

The U.S. Department of Education's administrative regulations for the IDEA are found in 34 C.F.R. §§300.1 *et seq.* According to section 300.533, Placement Procedures, each public agency is to

> "(4) Ensure that the placement decision is made in conformity with the LRE rules in §§300.550-300.554."

Section 300.550 gives the general requirements for ensuring that a child is placed in the least restrictive environment, and states:

> "(a) Each SEA shall ensure that each public agency establishes and implements procedures that meet the requirements of §§ 300.550-300.556.
>
> "(b) Each public agency shall ensure-
>
> "(1) That to the maximum extent appropriate, children with disabilities, including children in

public or private institutions or other care facilities, are educated with children who are nondisabled; and

"(2) That special classes, separate schooling or other removal of children with disabilities from the regular educational environment occurs only when the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily."

20 U.S.C. 1412(5)(B); 1414(a)(l)(C)(iv).

K.D.M. is attending a private school with nondisabled students. K.D.M. requires vision services. He is being educated in a separate classroom at his school. His parents want the vision services provided in the separate classroom. The school district alleges they cannot provide the services at the private school. The services are provided at a nearby fire hall because Oregon law prohibits the services from being provided in the school. In this instance, the school district is providing the student with special education services to the maximum extent possible. 34 CFR 300.550. There is no requirement that IDEA requires services to be provided in a religious school. 34 C.F.R. 300.403. *See also Goodall v. Stafford County School*, 930 F2d 363, cert den, 502 U.S.—— 112 SCt 188 (1991).

In K.D.M.'s circumstances, it cannot be argued that the visual therapy services provided in the fire hall are preventing his education with other students when if that service were provided in the private school in a separate room from other students, it would be no more beneficial.

Claimant argues that the Establishment Clause of the U.S. Constitution's First Amendment does not prohibit the placement of K.D.M.'s vision specialist in Harbor Baptist Church School.

In *Zobrest v. Catalina Foothills School District*, 125 L.Ed. 2d 1 (1993), the parents of a disabled child chose to send the child to a Roman Catholic sectarian high school. When they requested that the school district provide a sign-language interpreter, their request was denied on the basis that to do so would be a violation of the Federal Constitution. The United States Supreme Court reversed the U.S. Ninth Circuit Court of appeals and held that, pursuant to the Individuals with Disabilities Education Act (IDEA), it is *constitutionally permissible* to allow a public school district to provide a sign-language interpreter to accompany a deaf student to classes in a sectarian religious school. The court reasoned that the IDEA benefits went to the child who qualifies as "handicapped" under the IDEA, not to the sectarian organization, and thus were not impermissible.

It does not require placement of the vision specialist in the private school nor does it support claimant's contention that the OAR is contrary to law.

Claimant argues that Article I, Section 5, of the Oregon State Constitution does not prohibit the placement of K.D.M.'s vision specialist in Harbor Baptist Church School.

States must comply with Federal requirements if they accept special education payments. The law accommodated the states in allowing some flexibility in administering the program where the requirements of special education would come into conflict with issues of church and state or the nature of the disability. It was important that special education be provided to individuals in need of it regardless of religious affiliation. The federal regulations allow school districts to make modifications in what is provided as well as where the services are provided, keeping mindful of the "least restrictive environment" and the "maximum extent appropriate" requirements, assuring they are educated with children who are not disabled.

The School District argues that Article I, Section 5 should not be interpreted identically to the federal Establishment Clause. In *Cooper v. Eugene School District*, 723 P2d 298, 306 Or 1986, the court held that only "sometimes" is the interpretation the same and traditionally the provision of the State constitution has been construed more strictly than the federal Establishment Clause.

The SEA School districts must walk a fine balance between the requirements of 20 U.S.C. and the Oregon Constitution. School districts may provide the services at public schools or at a neutral site and the Reedsport School District provides the service at a neutral site.

The reality of the circumstances is that vision services are provided to a student who is eligible for special education. The services are provided at a religiously neutral setting across the street from the parochial school. The services are paid regardless of the location of the provided service. The student benefits and the school benefits. Where the benefit is a function of education, both benefit.

Claimant argues that refusal to place the vision specialist in his school is impermissibly hostile toward religion. The First Amendment to the U.S. Constitution "affirmatively mandates accommodation, not merely tolerance, of all religions, and forbids hostility toward any." *Lynch v. Donnelly*, 465 U.S. 668, 673 (1984). The IDEA, 20 U.S.C. § 1401 (a), promotes accommodation. The purpose of 20 U.S.C., Section 1400 was to assure that all children have available to them a free and appropriate education. The school district is reasonably accommodating K.D.M. by providing him with a vision specialist within the constraints of the regulations adopted by the State of Oregon as it relates to students attending private religious schools. The parents have elected to place K.D.M. in a private school. The State has complied with the IDEA and with State regulations by making services available to K.D.M. as provided under §§ 300.450-300.452. There is no

evidence that the action taken by the school district prevents K.D.M from practicing his religion or that the action prevents access to the vision specialist.

In interpreting the Equal Access Act, 20 U.S.C. §§ 4071-74 (1988), the United States Supreme Court held in *Board of Education v. Mergens*, 496 U.S. 226, 248 (1990) that, "[t]he Establishment Clause does not license government to treat religion and those who teach or practice it, simply by virtue of their status as such, as subversive of American ideals and therefore subject to unique disabilities." Claimant argues that to deny the visual specialist in his school setting merely because that school is religious subjects him to unique disabilities not faced by similarly situated students and as such it denies K.D.M. equal participation in the IDEA program. The facts differed substantially from the facts of the instant case. In *Mergens* the issue involved participation in a private school club that was not related to a specific curriculum. Additionally, the age of the students was considered. The court considered that secondary school students were mature enough to understand that a school does not endorse or support student speech that it merely permits on a nondiscriminatory basis. The courts determined that the Equal Access Act did not on its face contravene the Establishment Clause.

Claimant alleges that the failure to provide a vision specialist at Harbor Baptist Church School is a violation of 42 U.S.C. § 1983. It provides in part that "[ev]ery person who, under color of any statute, ordinance, regulation, custom or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitutions and the laws, shall be liable to the party injury in an action at law, suit in equity, or other proceeding for redress."

Zobrest does not require districts to provide special education services in a parochial school. In Oregon, the State has taken a position of neutrality consistent with the Oregon Constitution and adopted Administrative Rules which prohibit the provision of special education in a religious setting. The school district is providing special education to K.D.M., in compliance with the Oregon Administrative Rule, at a religiously neutral site.

The courts have been consistent in interpreting Article I, Section 5 of the Oregon Constitution regarding religious neutrality. The court contended in *Dickman v. School District 62C*, 232 Or. 238 (October 1962) that the wall of separation in the state of Oregon must be kept "high and impregnable" to meet the demands of Article I, Section 5.

The State is required to be neutral. *Zobrest* does not mandate provision of services in the private school. It allows it in some circumstances. Nothing in *Zobrest*, IDEA or the federal regulations makes provision of on-site services mandatory. The District is in compliance with IDEA, federal regulations, the Oregon Constitution and the Oregon Administrative Rules.

The hearing officer affirms for the school district.

ORDER:

Reedsport School District may continue to provide a vision specialist for K.D.M. at the fire hall.

Nov. 20, 1995

/s/ Kim Scranton,
KIM SCRANTON
Hearing Officer

NOTICE TO ALL PARTIES: If you are dissatisfied with this Order you may, within 120 days after the mailing date on this Order, commence a nonjury civil action in any circuit court of competent jurisdiction, ORS 343.175, or in the United States

District Court, 20 USC 1415(e) (2). Failure to request review within the time allowed will result in LOSS OF YOUR RIGHT TO APPEAL FROM THIS ORDER.

ENTERED at Salem, Oregon Nov 20, 1995 with copies mailed to:

Carol Esch, Oregon Department of Education, Public Service Building, 255 Capitol NE, Salem, Oregon 97310-0203

/s/ Patrica Jones
PATRICA JONES

CERTIFICATE OF SERVICE

I hereby certify that I served the foregoing FINAL ORDER in Case No. DP95-141 on the parties and attorneys named below on this 20th day of November 1995 by depositing a copy of said document in a sealed envelope in the United States Mail at Salem, Oregon, with the postage thereon fully prepaid, and addressed to:

Bill and Gwen Moore
563 Elm Avenue
Reedsport, OR 97467

James Robinson, Superintendent
Reedsport School District
100 Ranch Road
Reedsport, OR 97467-1799

Charles Craze, Attorney at Law
1550 El Camino Real Suite 220
Menlo Park, CA 94025

Bruce Zager, Attorney at Law
1011 Commercial N.E.
Salem, OR 97308

Jennifer Tymchuck
Special Education
Reedsport School District
100 Ranch Road
Reedsport, OR 97467-1799

/s/ Patrica Jones
PATRICA JONES

APPENDIX E

Education Code

20 U.S.C. §1412 (a)

(5) Least restrictive environment

(A) In general

To the maximum extent appropriate, children with disabilities, including children in public or private institutions or other care facilities, are educated with children who are not disabled, and special classes, separate schooling, or other removal of children with disabilities from the regular educational environment occurs only when the nature or severity of the disability of a child is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.

(10) Children in private schools

(A) Children enrolled in private schools by their parents

(i) In general

To the extent consistent with the number and location of children with disabilities in the State who are enrolled by their parents in private elementary and secondary schools, provision is made for the participation of those children in the program assisted or carried out under this subchapter by providing for such children special education and related services in accordance with the following requirements, unless the Secretary has arranged for services to those children under subsection (f) of this section:

(I) Amounts expended for the provision of those services by a local educational agency shall be

equal to a proportionate amount of Federal funds made available under this subchapter.

(II) Such services may be provided to children with disabilities on the premises of private, including parochial, schools, to the extent consistent with law.

(ii) Child-find requirement

The requirements of paragraph (3) of this subsection (relating to child find) shall apply with respect to children with disabilities in the State who are enrolled in private, including parochial, elementary and secondary schools.

(C) Payment for education of children enrolled in private schools without consent of or referral by the public agency

(i) In general

Subject to subparagraph (A), this subchapter does not require a local educational agency to pay for the cost of education, including special education and related services, of a child with a disability at a private school or facility if that agency made a free appropriate public education available to the child and the parents elected to place the child in such private school or facility.

20 U.S.C. §1415 (e)

(2) Requirements

Such procedures shall meet the following requirements:

(A) The procedures shall ensure that the mediation process–

(i) is voluntary on the part of the parties;

(ii) is not used to deny or delay a parent's right to a due process hearing under subsection (f) of this

section, or to deny any other rights afforded under this subchapter; and

(iii) is conducted by a qualified and impartial mediator who is trained in effective mediation techniques.

(B) A local educational agency or a State agency may establish procedures to require parents who choose not to use the mediation process to meet, at a time and location convenient to the parents, with a disinterested party who is under contract with –

(i) a parent training and information center or community parent resource center in the State established under section 1482 or 1483 of this title; or

(ii) an appropriate alternative dispute resolution entity; to encourage the use, and explain the benefits, of the mediation process to the parents.

(C) The State shall maintain a list of individuals who are qualified mediators and knowledgeable in laws and regulations relating to the provision of special education and related services.

(D) The State shall bear the cost of the mediation process, including the costs of meetings described in subparagraph (B).

(E) Each session in the mediation process shall be scheduled in a timely manner and shall be held in a location that is convenient to the parties to the dispute.

(F) An agreement reached by the parties to the dispute in the mediation process shall be set forth in a written mediation agreement.

(G) Discussions that occur during the mediation process shall be confidential and may not be used as evidence in any subsequent due process hearings or civil

proceedings and the parties to the mediation process may be required to sign a confidentiality pledge prior to the commencement of such process.

APPENDIX F

Oregon Administrative Rules
(filed through May 15, 2000)

581-015-0166

Public Educational Agency Responsibility for Children Placed by Parents in Private Schools

(1) If a child with a disability, who is age three through the age of eligibility for kindergarten, is offered a free and appropriate public education by the Department of Education and the parent of the child unilaterally enrolls the child in a private school, the child shall not have an individual entitlement to receive special education and related services from the Department of Education. Consistent with the procedures set forth in OAR 581-015-0171, the Department of Education shall determine which children with disabilities shall receive services, what services shall be provided and how those services shall be provided, including the location for the delivery of those services.

(2) If a child with a disability, who is at the age of eligibility for kindergarten through age 21, is offered a free appropriate public education by the child's resident school district and the parent of the child unilaterally enrolls the child in a private school, the child shall not have an individual entitlement to receive special education and related services from the child's resident school district. Consistent with the procedures set forth in OAR 581-015-0171, resident school districts shall determine which children with disabilities shall receive services, what services shall be provided and how those services shall be provided, including the location for the delivery of those services.

(3) Such special education and related services shall be provided in a religiously-neutral setting.

(4) The Department of Education and school districts shall provide such children with genuine opportunities for

equitable participation in special education consistent with the number of children and their needs.

Stat. Auth.: ORS 343.041, ORS 343.055 & CFR § 76.650

Stats. Implemented: ORS 343.155

Hist.: 1EB 28-1978, f. & ef. 7-20-78; 1EB 25-1980, f. & ef. 11-7-80; EB 12-1995, f. & cert. ef. 5-25-95

581-015-0171

Determination of Needs Number of Children and Types of Service through Consultation Process

(1) For purposes of this rule, "public educational agencies" means:

(a) The Department of Education for children who age three through the age of eligibility for kindergarten; and

(b) School districts for children who are at the age of eligibility for kindergarten through age 21.

(2) Public educational agencies shall consult with appropriate representatives of children with disabilities enrolled by their parents in private schools during all phases of the development and design of the special education services to be provided to private school children with disabilities, including consideration of:

(a) Which children shall receive services;

(b) How the needs of children shall be identified;

(c) What services shall be provided;

(d) How services shall be provided, including the location for the delivery of those services; and

(e) How the services shall be evaluated.

(3) The public educational agency shall consult with appropriate representatives of children with disabilities

enrolled by their parents in private schools before the public educational agency makes any decision that affects the opportunities of those children to receive special education services.

(4) The public educational agency shall give the appropriate representatives a genuine opportunity to express their views regarding each matter subject to the consultation requirements in this rule.

Stat. Auth.: ORS 343.041 , ORS 343.045 & ORS 343.055

Stats. Implemented: ORS 343.041 , ORS 343.055 & CFR § 76.650

Hist.: 1EB 28-1978, f. & ef. 7-20-78; EB 13-1995, f. & cert. ef. 5-25-95

(2)

Supreme Court, U.S.
FILED

No. 130131 JUL 10 2000

No. ___, ORIGINAL

OFFICE OF THE CLERK

In The

Supreme Court of the United States

THE SOUTHEAST INTERSTATE LOW-LEVEL RADIOACTIVE WASTE MANAGEMENT COMMISSION,

Plaintiff,

v.

STATE OF NORTH CAROLINA,

Defendant.

On Motion For Leave To File Bill Of Complaint

MOTION FOR LEAVE TO FILE BILL OF COMPLAINT AND BILL OF COMPLAINT

HENRY W. JONES, JR.
JORDAN PRICE WALL GRAY JONES & CARLTON
225 Hillsborough Street, Suite 200
Raleigh, North Carolina 27602
(919) 828-2501
Of Counsel

CARTER G. PHILLIPS*
COLLEEN M. LAUERMAN
SIDLEY & AUSTIN
1722 Eye Street, N.W.
Washington, D.C. 20006
(202) 736-8000
Attorneys for Plaintiff
**Counsel of Record*

July 10, 2000

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MOTION FOR LEAVE TO FILE BILL OF COMPLAINT

Plaintiff, the Southeast Interstate Low-Level Radioactive Waste Management Commission, by its undersigned counsel and pursuant to 28 U.S.C. § 1251(a) and to Rule 17 of the Rules of this Court, moves the Court for leave to file its Complaint against the State of North Carolina, for the reasons stated herein.

INTRODUCTION

In 1980, the United States Congress enacted the Low-Level Radioactive Waste Policy Act, which was amended by the Omnibus Low-Level Radioactive Waste Interstate Compact Consent Act. See Pub. L. No. 96-573, 94 Stat. 3347 (1980) and Pub. L. No. 99-240, 99 Stat. 1859 (1986) (collectively, the "Federal Acts"). The Federal Acts recognized that it is primarily the responsibility of the states to dispose of low-level radioactive waste, and encouraged the states to form regional interstate compacts to develop disposal facilities in an efficient and effective manner. The Southeast Interstate Low-Level Radioactive Waste Management Compact (the "Compact"), which is both a contract among the member States and a statute, was formally adopted by North Carolina in N.C. Gen. Stat. § 104-F. The legislatures of all the other member States[1] similarly entered into the Compact by enacting enabling legislation. On January 15, 1986, as part of the Omnibus

[1] The original party states to the Compact were Alabama, Florida, Georgia, Mississippi, North Carolina, South Carolina, Tennessee and Virginia.

Low-Level Radioactive Waste Interstate Compact Consent Act, Congress consented to the Compact, thereby making it a federal law. Pub. L. No. 99-240, Title II, 99 Stat. 1859 (1986).

The Compact established a Commission designed to, among other things, develop criteria and procedures for identifying one of the Compact member States as a host for the next regional disposal facility. South Carolina already had a disposal facility which could be used by the member States, but was planning to close it within several years of the enactment of the Compact. In September 1986, after a lengthy technical review and screening process by the Commission and outside consultants, North Carolina was designated by the Commission as the next host State. North Carolina willingly accepted this designation and commenced efforts to select and license a site. North Carolina also willingly accepted significant financial assistance from the Commission. Nevertheless, after more than a decade, no disposal facility ever has been licensed, let alone constructed, in and by North Carolina.

The language of the Compact is clear that the Commission bears no responsibility to pay the costs associated with building a disposal facility. However, at the request of North Carolina and to promote the timely creation of a new facility, the Commission contributed close to $80 million to North Carolina. This money was raised primarily by levying fees and surcharges on wastes being transported to the first regional disposal facility in Barnwell, South Carolina. When, in 1995, South Carolina withdrew from the Compact, due in large part to the State's frustration over the inordinate delays encountered with the North Carolina project, South Carolina

closed the Barnwell facility as the regional facility. In effect, this removed the Commission's only source of revenue so the Commission no longer was able to contribute to North Carolina's efforts to license and construct a disposal facility. The Commission made repeated attempts to develop funding alternatives acceptable to North Carolina. Rather than working with the Commission in its attempts to resolve the issue cooperatively, North Carolina asserted that the Commission was required to continue to provide funding, and eventually North Carolina closed down the project when the Commission ceased sending money to North Carolina.

As a consequence of North Carolina's intransigence, Florida and Tennessee filed with the Commission a Sanctions Complaint, alleging that North Carolina was in breach of the Compact and seeking sanctions against North Carolina. After notice and a hearing at which evidence was taken concerning North Carolina's breach of the Compact, the Commission found that North Carolina was in breach. As Commissioner Richard Hunter of Florida explained:

> . . . North Carolina enjoyed substantial benefits in protecting its public health as a member of this Compact through the years, and that when it came time for them to do their part . . . they were unable to meet those obligations in a timely manner and ultimately decided that they would not play.

Statement of Commissioner Hunter, Dec. 8, 1999 Sanctions Hearing Transcript (hereinafter "Tr.") at 34-35 (App.

AA 120a-121a). Based on the record evidence demonstrating both breach and the amount of money contributed by the Commission to North Carolina, the Commission concluded that North Carolina should disgorge the monies paid by the Commission. Accordingly, the Commission ordered North Carolina to repay $79,930,337, plus interest from the date North Carolina ceased activities to develop the requisite facility, January 1, 1998, to the Commission. In addition, the Commission ordered North Carolina to pay $10 million for the loss of a source of funds for the Commission's operating budget for a period of 20 years, and attorneys' fees. North Carolina has defied the Commission's order and refused to pay the sanction. Accordingly, Plaintiff invokes this Court's original jurisdiction to vindicate the States' rights under the Compact and any other rights they may have at common law to recover the money that North Carolina accepted without fulfilling its corresponding duty to create a disposal facility, and to enforce the Sanction Order entered against North Carolina by the Commission.

STATEMENT OF THE CASE

A. The Southeast Interstate Low-Level Radioactive Waste Management Compact.

The Southeast Interstate Low-Level Radioactive Waste Management Compact (the "Compact") was consented to by the United States Congress on January 15, 1986 as part of the Omnibus Low-Level Radioactive Waste Interstate Compact Consent Act. Pub. L. No. 99-240, Tit. II, 99 Stat. 1859 (1986) (hereinafter cited as

"Compact"). The original member States in the Compact were Alabama, Florida, Georgia, Mississippi, North Carolina, South Carolina, Tennessee and Virginia. Compact, Art. 7(A), 99 Stat. at 1878. The Compact was enacted by each State, including North Carolina, followed by receipt of Congressional consent. See, *e.g.*, N.C. Gen. Stat. § 104-F (repealed eff. July 22, 1999).

The Compact was enacted in recognition of several policy objectives. First, by entering into the Compact, the States "recognize[d] and declare[d] that each state is responsible for providing for the availability of capacity either within or outside the State for disposal of low-level radioactive waste generated within its borders," and that "management of low-level radioactive waste is handled most efficiently on a regional basis." Compact, Art. 1, 99 Stat. at 1871. Further, the States "recognize[d] that the safe and efficient management of low-level radioactive waste generated within the region requires that sufficient capacity to dispose of such waste be properly provided." *Id.* at 1872. In addition, "[i]t is the policy of the party states to: enter into a regional low-level radioactive waste management compact for the purpose of providing the instrument and framework for a cooperative effort [and for] provid[ing] sufficient facilities for the proper management of low-level radioactive waste generated in the region. . . . " *Id.*

The Compact, by its terms, created the Southeast Interstate Low-Level Radioactive Waste Management Commission (the "Commission" or "Compact Commission"), consisting of two voting members from each member State, to be appointed according to the laws of each

State. *Id.*, Art. 4(A), 99 Stat. at 1874. Among the Commission's duties were to develop and adopt procedures and criteria for identifying a State as a host State for a regional facility and to identify a host State for the development of a second regional disposal facility. *Id.*, Art. 4(E)(6), 99 Stat. at 1875. The first regional disposal facility was the existing low-level radioactive waste disposal facility located in Barnwell County, South Carolina. Pub. L. No. 101-171, sec. 2, Art. 7(H), 103 Stat. 1289, 1289 (1989).

Further, the Commission was authorized to ensure that this second regional disposal facility would be licensed and ready to operate as soon as required, but in no event later than 1991. Compact, Art. 4(E)(6), 99 Stat. at 1875. The Compact requires that each member State that is designated as a host State must take "appropriate steps" to ensure that an application for a license to construct and operate a facility is filed with and issued by the appropriate regulatory authority. *Id.*, Art. 5, 99 Stat. at 1877. Further, Article 3(C) states that host States "are responsible for the availability, the subsequent post-closure observation and maintenance, and the extended institutional control of their regional facilities . . . . " *Id.* at 1873-74. Moreover, the Compact expressly states that the Commission is "not responsible for any costs associated with: (1) the creation of any facility . . . . " *Id.*, Art. 4(K), 99 Stat. at 1876.

The Compact also vests in the Commission the power to revoke the membership of a member State that "willfully creates barriers to the siting of a needed regional facility." *Id.*, Art. 4(E)(7), 99 Stat. at 1875. If the Commission resolves to revoke the status of a State as a party to

the Compact, it must provide written notice of the action to the Governors, Presidents of the Senates, and Speakers of the Houses of Representatives of the member States, as well as to the chairpersons of the appropriate committees of Congress. *Id.*, Art. 7(F), 99 Stat. at 1879. The Compact further provides for other remedies against recalcitrant member States:

> *Any party state which fails to comply with the provisions of this compact or to fulfill the obligations incurred by becoming a party state to this compact may be subject to sanctions by the Commission,* including suspension of its rights under this compact and revocation of its status as a party state. . . . Rights and obligations incurred by being declared a party state to this compact shall continue until the effective date of the sanction imposed or as provided in the resolution of the Commission imposing the sanction.

Id. (emphasis added).

B. The Present Controversy.

In September 1986, following a lengthy screening and review process by the Commission and outside consultants, the Commission, by a two-thirds majority vote, selected the State of North Carolina as the second host State. The designation of North Carolina as the host State obligated North Carolina to develop and operate a facility to receive the region's low-level radioactive waste for disposal for a period of 20 years. As provided in the Compact, North Carolina, as the host State, had the responsibility for financing, siting and licensing the facility. In turn, North Carolina would be repaid for its

expenses from revenues generated by the facility, once operational. North Carolina acknowledged this financial arrangement by the enactment of N.C. Gen. Stat. § 104G-15 (repealed eff. July 1, 2000), which speaks of recovery of the State's costs through the imposition of fees by the operating facility.

Following the designation of North Carolina as host State, the North Carolina General Assembly considered, but rejected in August 1987, a bill to withdraw from the Compact. Instead, the General Assembly enacted a law developing the siting authority: the North Carolina Low-Level Waste Management Authority (the "North Carolina Authority"). As further evidence of its recognition of its host State status, North Carolina proposed amendments to the Compact concerning the length of time a disposal facility was required to act as the regional facility and concerning the terms for withdrawing from the Compact. The proposed amendments, which made it more difficult for States to withdraw after the second disposal site opened, were adopted by all member States and consented to by Congress. Pub. L. No. 101-171, 103 Stat. at 1289.

Although not obligated to do so, see Compact, Art. 4(K), 99 Stat. at 1876, in response to a request from North Carolina, the Commission determined in 1988 that it was "appropriate and necessary" for it to provide financial assistance to any State designated as the next host State "for the initial planning and administrative costs and other pre-operational costs associated with that state's obligation to create and operate a regional facility." See Feb. 9, 1988 Resolution (App. A 1a). Accordingly, the Commission voted to appropriate $200,000 in its annual

budget to a trust fund for that purpose. In total, the Commission provided $1,200,000 to North Carolina through this fund.

In December 1988, Governor Campbell of South Carolina notified the Commission that the Barnwell facility would cease to serve as the regional disposal facility on December 31, 1992. Subsequently, in 1989, at North Carolina's request, the Commission adopted a Capacity Assurance Charge on regional waste going to the Barnwell, South Carolina facility to provide funds "[t]o assure the timely development of the second regional disposal facility in North Carolina." See Oct. 24, 1989 Minutes, Southeast Compact Commission (App. B 7a). These funds were intended to support the licensing phase of North Carolina's site development. The Commission provided $19,733,816 to North Carolina through the collection of this Capacity Assurance Charge between January 1, 1990 and December 31, 1992.

In July 1990, after years of assurances that the January 1, 1993 target date for completion of the construction of the facility was feasible, the North Carolina Authority submitted a revised work plan, which put completion of the project two years behind schedule and nearly doubled the cost, excluding construction costs. For its part, the Commission established an Access Fee on regional waste going to the Barnwell, South Carolina facility. Once again, these funds were intended for use in the development of the facility in North Carolina. See Nov. 15, 1990 Minutes, Southeast Compact Commission (App. C 22a-23a). A total of $12,012,795 in Access Fees was collected and provided to North Carolina.

In October 1991, the North Carolina Authority announced a new siting schedule, with the site's opening set for February 1996. In February 1992, the Commission recommended that the Barnwell facility remain open, provided certain conditions were met, including meeting certain milestones with regard to the development of the North Carolina facility. In June 1992, the South Carolina Legislature voted to allow the Barnwell facility to remain open as the regional disposal site until January 1, 1996.

In its continued effort to assist North Carolina in developing the much-needed second disposal facility, the Commission implemented an Out-of-Region Access Fee on out-of-region waste going to the Barnwell, South Carolina facility during the period January 1, 1993 through June 30, 1994. See Sept. 28, 1992 Commission Minutes (App. D 32a-38a). The charge was $220 per cubic foot of out-of-region waste, with $160 of this fee going to South Carolina and $60 going to the Commission. Through the collection of this fee, the Commission provided an additional $23,459,786 to North Carolina for use in connection with the licensing and development of the disposal facility.

In addition to the foregoing, at North Carolina's request, the Commission levied $3,000,000 per quarter in access fees on southeast waste generators for the period January 1, 1993 through December 31, 1995 "[i]n order to assure the continued development of the second regional disposal facility for low-level radioactive waste ("LLRW") in North Carolina. . . . " See Nov. 13, 1992 Commission Minutes (App. E 39a-40a). A total of $23,405,699 of this access fee was collected and provided to North Carolina. By December 1993, the North Carolina

Authority had selected the Wake County site and had submitted a license application.

Next, the Commission granted North Carolina's request for the advancement of money from the Regional Access Fee fund "when necessary on a documentated [sic] basis not to exceed a total of $3 Million." The Commission also approved the transfer of up to $7 million in additional funds to North Carolina on an as-needed basis. See Apr. 29, 1994 Commission Minutes (App. F 41a-42a). In August 1994, the North Carolina Division of Radiation Protection, the State's licensing authority, announced there would be a 15-month delay in the licensing process, thereby further postponing the opening of the North Carolina facility until at least June 1997, assuming no construction or litigation delays. In December 1994, the North Carolina Authority approved an additional one-year delay, postponing the opening of the new facility until 1998.

In May 1995, the Commission met twice to consider a South Carolina proposal to extend the operation of the Barnwell facility. The proposal would have denied access to Barnwell to North Carolina until North Carolina issued the license for the new facility. Because the denial of access for North Carolina was considered a sanction against North Carolina, the vote required a two-thirds majority for approval. The Commission voted on South Carolina's proposal twice, and both times the resolution failed by a single vote.

In July 1995, South Carolina withdrew from the Compact. As a result, the Commission no longer could levy fees and surcharges on waste disposed of at the Barnwell

facility. This eliminated the traditional source of revenue to fund the Commission's operations, as well as site development activities. See Tr. at 54 (App. AA 123a) (Question (by Mr. Jones): "When a source of funding from Barnwell was cut off to the Commission, was there any other major source of funding to the Commission from which funds could be given to the State of North Carolina?" Answer (by Commissioner Mobley): "No. We had no other funding other than some interest on our accrued funds."); *id.* at 83-84 (App. AA 126a) (same).

On January 5, 1996, the Chairman of the Commission, Richard S. Hodes, M.D., wrote to North Carolina Governor James B. Hunt, Jr. to explain that the Commission, up to that point in time, had contributed $55 million to North Carolina in furtherance of the facility development project but that additional Commission funds at a later point would be unavailable. Chairman Hodes encouraged Governor Hunt to begin considering alternative funding opportunities, consistent with North Carolina's obligations under the Compact. See Jan. 5, 1996 Hodes letter to Hunt at 3 (App. G 46a-47a). Chairman Hodes sent several subsequent letters to Governor Hunt reminding him that, by law, the designated host State is responsible for siting, licensing, building and operating the facility, and that this responsibility includes providing the necessary funding. See, *e.g.*, Apr. 25, 1996 Hodes letter to Hunt (App. H 48a-50a); May 10, 1996 Hodes letter to Hunt (App. I 51a-52a).

Nevertheless, on June 14, 1996, Governor Hunt informed the Commission that "North Carolina [was] not prepared to assume a greater portion of the project costs. If the Commission is not willing or able to continue

funding the North Carolina licensing effort, it simply will not be able to proceed." See June 14, 1996 Hunt letter to Hodes at 2 (App. J 54a-55a). In taking this position, Governor Hunt ignored the plain language of the Compact, which clearly states the Commission is "not responsible for any costs associated with: (1) the creation of any facility . . . . " Compact, Art. 4(K), 99 Stat. at 1876. Nevertheless, the Governor continued to blame delays on the Commission's alleged failure to provide North Carolina with adequate funds. See July 18, 1996 Hunt letter to Hodes (App. K 56a-57a) (North Carolina requested $4 million necessary to go forward with the first phase of the work; "If the project is delayed, it will be the result of the Commission turning down the funding request."). In fact, the Commission continued to offer interim funding to North Carolina. See July 9, 1996 Hodes letter to Hunt (App. L 58a-59a). Moreover, the delays actually were caused by North Carolina itself. *E.g.*, July 18, 1996 Hodes letter to Hunt (App. M 60a-61a). For example, in June 1996, the North Carolina Authority adopted a Licensing Work Plan under which the facility would not open until 2001, assuming no construction or litigation delays.

Despite the foot-dragging of North Carolina and in a good faith effort to move the licensing and construction project along, the Commission authorized, subject to compliance by North Carolina with five conditions, the release of funds on a quarterly basis to the North Carolina Authority to cover amounts expended by the Authority in performing the licensing work plan developed by the Authority. See Oct. 3, 1996 Minutes at 2 (App. N 63a-67a). In order to implement this program, the Commission authorized providing a total of $6.5 million to

restart the North Carolina project, which had been closed down by the North Carolina Authority in July 1996, allegedly due to a lack of funds.

In 1997, the Commission voted to release an additional $2.9 million to the North Carolina Authority, based on the affirmative recommendation of the Authority that it "ma[de] sense to proceed with the project." See Apr. 18, 1997 Minutes at 5 (App. O 71a). Subsequently, the Commission voted to approve the North Carolina Authority's request for additional funding up to $1.4 million for the months of August and September. Funding beyond the $1.4 million would be considered upon receipt by the Commission of a successful progress report by the North Carolina Department of Environment and Natural Resources. See Minutes (App. P 77a). Finally, in August 1997, the Commission voted to provide interim stop-gap funding to the North Carolina Authority up to $1.2 million. See Aug. 21, 1997 Minutes at 5 (App. Q 80a).

Despite the Commission's numerous efforts to resolve (and to urge North Carolina to resolve) the funding problems, no solution was reached. Consequently, the Commission organized a Task Force for Facility Funding (the "Task Force") to study the issue and make recommendations for funding alternatives. The Task Force included volunteer representatives of the North Carolina Authority, the Commission, waste generators and the public. The Task Force issued a consensus report in May 1997 that included specific recommendations for funding. The Commission approved the recommendations in July 1997.

A group of regional waste generators developed a draft Memorandum of Understanding ("MOU") that implemented the Task Force's recommendations. The Commission transmitted to Governor Hunt the draft MOU in August 1997. See Aug. 28, 1997 Hodes letter to Hunt at 1 (App. R 82a-83a). Under the proposed MOU, the Commission and volunteer generators would have funded the remainder of the licensing costs in return for certain commitments from North Carolina. Upon transmission of the proposed MOU, the Commission asked the North Carolina Authority either to endorse the proposal or to propose an alternative method of funding by December 1, 1997, as a condition of future funding. More than two months later, and more than ten years after North Carolina was designated as the next host State, Governor Hunt responded to the Commission by raising several concerns about the proposal, but without making any commitment to proceed absent the Commission "com[ing] up with some . . . approach that provides the relatively few dollars needed to complete *licensing* without jeopardizing the future operation and financing of the facility." Nov. 3, 1997 Hunt letter to Hodes at 2 (App. S 89a) (emphasis added). Governor Hunt did not accept the Commission's offer to fund the project through the Memorandum of Understanding, nor did he suggest an alternative method of funding.

Chairman Hodes responded by, among other things, reiterating that it was "the intent of the compact law to [distribute costs] by obligating each party state, in turn, to develop and operate a facility. It has always been the intent of the law that each host state would be repaid for its expenses from facility revenues." Nov. 14, 1997 Hodes

letter to Hunt at 2 (App. T 94a); see also Tr. at 40, 62-63 (App. AA 122a, 124a-125a). Chairman Hodes also restated the Commission's position that, if an agreement in principle regarding funding could not be reached by December 1, 1997, the Commission would not provide funding for work performed after November 30, 1997. App. T 94a; see also Tr. at 82-84 (App. AA 126a-127a).

By December 1, 1997, North Carolina had neither endorsed the MOU nor proposed any other funding plan. Instead, the Chair of the North Carolina Authority notified the Commission of the Authority's decision to "commence the orderly shutdown of the project" pending instruction from the North Carolina Legislature or the Commission's reversal of its position regarding funding. See Dec. 19, 1997 Corgan letter to Hodes at 3 (App. U 99a). Corgan stated that it was "North Carolina's view that the Compact Commission and the other member states have failed to honor their commitments under the compact law and made further performance by the Authority impossible." *Id.* at 1 (App. U 96a). Like Governor Hunt, Chairman Corgan attempted to lay the blame on the Commission for North Carolina's failure to develop a disposal facility in the over eleven years since North Carolina was designated as the next host State: "It is extremely unfortunate that the Compact's actions have caused the project to be stopped. . . . The Authority has no real choice but to commence a project shutdown given . . . the Compact's unwillingness to spend its existing funds." *Id.* at 3 (App. U 99a). The Commission notified the North Carolina Authority in January 1998 that the shut down constituted a breach of the Compact by North Carolina.

On April 26, 1999, Chairman Hodes notified Governor Hunt that the "Commission believes that the State of North Carolina currently stands in violation of the compact law, threatening the health and safety and economic well-being of the citizens of seven states, by failing to proceed" with the development of the disposal facility. See Apr. 26, 1999 Hodes letter to Hunt (App. V 105a). Hodes asked that North Carolina provide the Commission with a written plan and schedule for North Carolina to bring itself into compliance with compact law and to provide a disposal facility for the region. North Carolina took no action in response.

Due to North Carolina's failure to fulfill its obligations, the States in the Compact found themselves without a new regional disposal facility after waiting more than twelve years for North Carolina to develop one. Moreover, the member States, who had contributed directly or indirectly most of the funds, recognized that the Commission had contributed nearly $80 million to North Carolina, with nothing to show for this enormous investment. Frustrated and without other recourse, the Commissioners of the States of Florida and Tennessee filed with the Commission a Sanctions Complaint against North Carolina on June 21, 1999. (App. W 107a-111a). The Sanctions Complaint alleged that North Carolina failed to fulfill its obligations as a member State in the Compact and as the designated host State by not providing a disposal facility for the region. Further, the Sanctions Complaint requested, among other things, return of the $79,930,337 in funds the Commission had provided to North Carolina to assist in the licensing and development of the disposal facility, plus interest from the date North

Carolina ceased activities to develop the requisite facility, January 1, 1998.

On July 26, 1999, North Carolina purported to exercise its rights under Article 7(G) of the Compact to withdraw from the Compact. 1999 N.C. Sess. Laws 357. North Carolina claimed that it "had no option but to" withdraw as a result of the Commission's breach (by terminating supplemental funding as of December 1, 1997) of the Compact. See Dec. 1, 1999 Letter from Michael F. Easley, North Carolina Attorney General, to Hodes at 1 (App. X 113a).

In August 1999, the Commission adopted the recommendation of the Sanctions Committee to initiate a formal inquiry into the complaint filed against North Carolina. On November 8, 1999, the Commission provided North Carolina with formal notice of a sanctions hearing to be held on December 8, 1999. See Nov. 8, 1999 Haynes letter to Hunt (App. Y 115a-116a). Attorney General Easley mistakenly asserted that having withdrawn from the Compact, North Carolina no longer was subject to the jurisdiction of the Commission. Further, he claimed that the Commission lacked authority to conduct a sanctions proceeding against a State that had voluntarily withdrawn from the Compact. See App. X 114a. Finally, Mr. Easley informed Chairman Hodes that North Carolina would not participate in the sanctions proceeding and would "vigorously oppose any effort by the Commission to impose sanctions or retain further jurisdiction" over the State. *Id.*

The Commission held a Sanctions Hearing on December 8, 1999. The Commission heard testimony and

received documentary evidence from the States of Florida and Tennessee. All of the Commissioners were permitted to ask questions and make comments. Comments also were received from members of the public. In addition, North Carolina again was provided the opportunity to offer any testimony or other evidence on its behalf. North Carolina steadfastly chose not to exercise its rights under the Compact to defend itself.

By a unanimous vote, the Commission found that North Carolina had failed to fulfill its obligations under the Compact. Consequently, the Commission voted to require North Carolina to repay the $79,930,337 in funds it had received from the Commission for use in licensing and developing a disposal facility, plus interest from January 1, 1998, the date North Carolina ceased activities to develop the requisite facility. The Commission also voted to require North Carolina to pay $10 million for the loss of the source of funds the facility would have provided to the Commission's operating budget for 20 years, and the Commission's attorneys' fees. North Carolina was given until July 10, 2000 to comply with this order. Immediately following the announcement of the Commission's decision, the North Carolina Attorney General stated in a press release that North Carolina would not repay the funds. See Dec. 9, 1999 Press Release (App. Z 117a). The deadline for North Carolina to comply with the order has now passed. Accordingly, Plaintiff brings this action against North Carolina to enforce the Compact or otherwise obtain redress for North Carolina's wrongful conduct.

REASONS THE COURT SHOULD EXERCISE ITS ORIGINAL JURISDICTION

This case involves a dispute among North Carolina, on the one hand, and the Commission and the remaining member States, on the other. The Commission represents the Compact which is comprised of six States (excluding North Carolina for these purposes). At issue is the proper interpretation and enforcement of the Compact's requirements. Plaintiff urges this Court, *inter alia*, to determine under the Compact: (1) whether the imposition of the sanctions in this case, including the disgorgement of the $79,930,337 provided to North Carolina to license and develop a regional disposal facility, that was never licensed let alone completed, was a valid exercise of the Commission's sanction authority, as set forth in Article 4(F) of the Compact; and (2) whether North Carolina is obligated to comply with the Sanctions Order issued by the Commission, including repaying to the Commission $79,930,337 plus interest. Having previously exercised its original jurisdiction to resolve disputes among sovereign states arising under compact laws, this Court is uniquely competent to interpret the relevant interstate compact provisions.

Action by this Court is particularly warranted because serious public health concerns are at stake in this dispute. The States belonging to the Compact have been without a regional disposal facility since 1995, when South Carolina withdrew from the Compact in frustration over North Carolina's steadfast failure to develop a disposal facility. Moreover, since 1995, the Commission has been without any means of raising the significant funds

needed to obtain disposal capacity or to fund Commission operations. The States and generators must either find a way to store their radioactive wastes at hundreds of locations throughout the region, cease the activities that generate the waste, or pay significant fees to dispose of waste at an "outside" facility, if such a facility is available. As a result, the objectives of Congress in enacting the Low-Level Radioactive Waste Policy Act have been thwarted and there exists a serious threat to the public health and safety the longer this region remains without a regional disposal facility.

Moreover, this case is not susceptible to expeditious, impartial resolution in any other forum. The Compact itself establishes the authority of the Commission to impose sanctions against member States that fail to fulfill their obligations under the Compact. Compact, Art. 7(F), 99 Stat. at 1879. The Compact does not provide an express mechanism for judicial review or relief. Nevertheless, as this Court previously has stated: "In the absence of an explicit provision or other clear indications that a bargain to that effect was made, we shall not construe a compact to preclude a State from seeking judicial relief when the compact does not provide an equivalent method of vindicating the State's rights." *Texas* v. *New Mexico*, 462 U.S. 554, 569-70 (1983).

Florida and Tennessee pursued the only mechanism expressly available to them, *viz.*, a sanctions hearing before the Commission against North Carolina. North Carolina was provided with formal notice and a full

opportunity to be heard.[2] A hearing was presided over by an experienced, impartial officer. Testimony was heard, documentary evidence was received, and the decision to impose sanctions, including restitution, was unanimously approved by the Commission. North Carolina, despite two invitations to participate in the proceeding and present evidence on its behalf,[3] opted not to participate in the Sanctions Hearing.

At a fundamental level, North Carolina's attempt to shirk the responsibilities it voluntarily assumed by becoming a member of the Compact might have a chilling effect on other states in similar situations were North Carolina permitted to succeed. As Commissioner Charles Hawkins of Virginia noted during the Sanctions Hearing:

> If compacts have no more validity than this one does, and being able to withdraw at a time that you feel is to your convenience, the whole concept falls apart. . . . This goes beyond this compact, this goes beyond this group of states, this goes into the arena of what we can depend on as we enter into agreements among consenting states for the betterment of our citizens. . . . [I]f something is not in place to bring some sort of stability to the commitments made, no state, no general assembly will be willing to go on record to support any other compact with their

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[2] North Carolina was served with notice by certified mail. Nov. 8, 1999 Haynes letter to Hunt (App. Y 115a). Receipt of notice was acknowledged by the Attorney General of North Carolina. *See* Dec. 1, 1999 Easley letter at 1 (App. X 112a).

[3] North Carolina, which had representatives present at the Sanctions Hearing, again was urged to present evidence at the Hearing itself. *See* Tr. at 93 (App. AA 130a).

> moneys or their time or their efforts, knowing full well that at any point during the process, a state can withdraw based on the whim of that particular legislative body. And that's no way to build agreements . . . .

Tr. at 91-92 (App. AA 128a-129a). Commissioner Hawkins' concerns were shared by Alternate Commissioner A.C. McNeer of Virginia:

> [I]f we don't resolve this issue here, it has national implications and, for the future of the compact system itself, I think we have to resolve it in a responsible way or we're inviting trouble.

Id. at 92 (App. AA 129a). The Commission did just that, within the bounds of its contractual and statutorily created authority, and its decision should be upheld and enforced.

Because North Carolina has refused to comply with its obligations and with the Sanctions Order, Plaintiff must seek judicial relief to declare the Sanctions Order valid and to enforce the Commission's action. The circumstances of this case, in which a super-majority of the member States have imposed a sanction on another State, pursuant to the method agreed upon by the States at the time of ratification of the Compact, present precisely the type of case that warrants the exercise of this Court's original jurisdiction. Were this Court to decline to exercise jurisdiction, the sanctions mechanism provided for in the Compact would be rendered useless and the States would be without an alternative forum in which to enforce their claims. Plainly this was not the intent of the parties or Congress, and this Court is the appropriate institution to protect those expectations.

ARGUMENT

This Court traditionally has considered two factors in determining whether to exercise its original jurisdiction under Article III, § 2 of the United States Constitution,[4] and 28 U.S.C. § 1251(a):

> Determining whether a case is "appropriate" for our original jurisdiction involves an examination of two factors. First, we look to the "nature of the interest of the complaining State," focusing on the "seriousness and dignity of the claim." . . . Second, we explore the availability of an alternative forum in which the issue tendered can be resolved.

Mississippi v. *Louisiana*, 506 U.S. 73, 77 (1992) (citations omitted). Significantly, the Court rarely has declined to exercise its original jurisdiction in cases such as this one, which involves a dispute among sovereign states[5] concerning the interpretation and enforcement of an interstate compact. See, *e.g.*, *Texas* v. *New Mexico*, 462 U.S. 554, 567-68 (1983) ("If there is a compact, it is a law of the

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[4] "In all Cases . . . in which a State shall be a Party, the supreme Court shall have original Jurisdiction. . . . " U.S. Const. art. III, § 2, cl. 2.

[5] Among the "duties and powers" delegated to the Commission by the Compact includes the power "[t]o act or appear on behalf of any party state or states" before any court of law. Compact, Art. 4(E)(10), 99 Stat. at 1874-75. By Commission resolution adopted December 9, 1999, the States authorized the Commission to act on their behalf, including in litigation, to enforce the sanctions imposed on North Carolina. *See* Dec. 9, 1999 Resolution (App. BB 132a). Accordingly, the Commission stands in the shoes of the member States in this action.

United States, and our first and last order of business is interpreting the compact.") (citation omitted).

A. The Nature Of The States' Interest Weighs In Favor Of The Court Exercising Original Jurisdiction.

Resolution of a fundamental and irreconcilable difference among the States concerning the proper interpretation of an interstate compact is the archetypical matter warranting the Court's exercise of its exclusive, original jurisdiction. This Court consistently has recognized its " 'serious responsibility to adjudicate cases where there are actual, existing controversies' between the States . . . . " *Oklahoma* v. *New Mexico*, 501 U.S. 221, 241 (1991) (quoting *Arizona* v. *California*, 373 U.S. 546, 564 (1963)).

The States have a significant and congressionally recognized interest in providing for the safe and efficient disposal of low-level radioactive waste on a regional basis. The States' attempt to realize this goal was prevented by the actions and failures to act of North Carolina, which constituted violations of North Carolina's obligations under the Compact in two ways: first, by failing to fulfill its obligations as the designated second host State; and second, by failing to comply with the Sanctions Order validly issued against it.

By signing on to the Compact, North Carolina agreed that it would accept a designation as a host State. It also formally accepted the designation by enacting N.C. Gen. Stats. §§ 104-F and 104-G and by appropriating funds for site development. Along with that designation goes the

responsibility of funding, licensing, developing and operating a regional disposal facility for 20 years. In return, North Carolina would be repaid fully for its expenses from the revenue generated by the facility. Moreover, subsequent facilities would be sited in other States, ensuring North Carolina's ability for generations to come to have a safe and convenient location for disposing of its low-level radioactive waste.

North Carolina refused to honor this arrangement or to accept its manifest responsibility for the project. Although for years the Commission provided funds to North Carolina to assist with the project, when the Commission's source of revenue was eliminated and the Commission no longer could contribute to the project, North Carolina refused to cooperate with the Commission and others to find alternative funding sources. Instead, North Carolina terminated the project, thereby disavowing its statutory, contractual and equitable obligations to serve as the next host State under the Compact.

Second, North Carolina has refused to comply with the Sanctions Order imposed by the Commission following a full and fair hearing. In fact, North Carolina refused entirely to participate in the Sanctions Hearing, claiming that it no longer was subject to the jurisdiction of the Commission, having announced its intention to withdraw from the Compact in July 1999. North Carolina is mistaken. Although North Carolina enacted legislation with the intent to withdraw from the Compact in July 1999, its preexisting obligations under the Compact did not cease until either the effective date of the sanction imposed or as provided in the resolution of the Commission

imposing the sanction. See Compact, Art. 7(F), 99 Stat. at 1879. Therefore, the Commission retained plenary authority to impose the sanction at issue here, having found after a full and fair hearing that North Carolina failed to fulfill its obligations both under and arising out of the Compact. In sum, North Carolina has refused without justification to comply with the Commission's Sanction Order.

North Carolina's actions have left the remaining member States in a precarious position vis-à-vis the disposal of low-level radioactive waste and have exposed the states to potentially serious threats to the public health and safety of their citizens. As Commissioner Mobley of Tennessee noted during the Sanctions Hearing, "nothing can reclaim the time that has been lost. Once again, the Southeast Compact is faced with a prospect of numerous facilities within our states either storing waste indefinitely or terminating those operations which utilize radioactive materials due to the lack of disposal facility." Tr. at 13 (App. AA 119a).

B. The States Have No Adequate Alternative Forum For Resolving Their Dispute With Another Sovereign State.

This Court has exclusive subject matter jurisdiction over suits among States. 28 U.S.C. § 1251(a) ("The Supreme Court shall have original and exclusive jurisdiction of all controversies between two or more States."). Moreover, it is the only forum in which the States are guaranteed to receive a fair and impartial ruling as to the proper interpretation and enforcement of the Compact

that regulates the relevant relationship among them. As the Court stated in *West Virginia ex rel. Dyer* v. *Sims*, 341 U.S. 22 (1951):

> It requires no elaborate argument to reject the suggestion that an agreement solemnly entered into between States . . . can be unilaterally nullified, or given final meaning by an organ of one of the contracting States. A State cannot be its own ultimate judge in a controversy with a sister State. To determine the nature and scope of obligations as between States, whether they arise through the legislative means of compact or the "federal common law" governing interstate controversies, is the function and duty of the Supreme Court of the Nation.

Id. at 28 (citation omitted).

There is no pending proceeding on this matter in any other jurisdiction, nor is there another jurisdiction available in which a State would not be "its own ultimate judge in a controversy with a sister State." *Id.* Requiring Plaintiff to submit the determination of its compact claims to a North Carolina court or any other court is inconsistent with one of the central purposes of this Court's original jurisdiction: "the belief that no State should be compelled to resort to the tribunals of other States for redress, since parochial factors might often lead to the appearance, if not the reality, of partiality to one's own." *Ohio* v. *Wyandotte Chems. Corp.*, 401 U.S. 493, 500 (1971) (citing *Chisholm* v. *Georgia*, 2 U.S. (2 Dall.) 419, 475-76 (1793)). Moreover, requiring the parties to litigate this dispute elsewhere will accomplish nothing but delay and expense. This matter ultimately will return to this Court, but only years and many hundreds of thousands

of dollars later – time and money the Commission and the States do not have to spare. This problem is particularly acute given that the States are subject to ongoing injury and the threat of even greater harm until this matter is resolved and the member States are able to designate and build the long overdue and much needed regional disposal facility North Carolina solemnly undertook to develop but failed to construct, even after the Commission provided almost $80 million to assist North Carolina in those efforts.

CONCLUSION

The Court should grant Plaintiff's motion for leave to file the Complaint. Plaintiff further requests that the Court order North Carolina to show cause why the Compact Commission's sanction decision should not be summarily affirmed and enforced.

Respectfully submitted,

HENRY W. JONES, JR.
JORDAN PRICE WALL GRAY JONES & CARLTON
225 Hillsborough Street, Suite 200
Raleigh, North Carolina 27602
(919) 828-2501

Of Counsel

CARTER G. PHILLIPS*
COLLEEN M. LAUERMAN
SIDLEY & AUSTIN
1722 Eye Street, N.W.
Washington, D.C. 20006
(202) 736-8000

Attorneys for Plaintiff

**Counsel of Record*

July 10, 2000

BILL OF COMPLAINT

BILL OF COMPLAINT

1. The Southeast Interstate Low-Level Radioactive Waste Management Commission, by and through undersigned counsel, for its Complaint against the State of North Carolina alleges as follows:

PARTIES

2. The Southeast Interstate Low-Level Radioactive Waste Management Commission (the "Commission" or the "Compact Commission") was created by statute to, among other things, administer the Southeast Interstate Low-Level Radioactive Waste Management Compact. Pub. L. No. 99-240, Tit. II, 99 Stat. 1859 (1986) (hereinafter cited as "Compact"). By statute, the Commission was delegated the authority to "act or appear on behalf of any state or states . . . before Congress, state legislatures and any court of law . . . . " Compact, Art. 4(E)(10), 99 Stat. at 1875.

3. The State of North Carolina has been a party to the Southeast Interstate Low-Level Radioactive Waste Management Compact. The Compact was codified by the legislature of North Carolina at N.C. Gen. Stat. § 104-F (repealed eff. July 22, 1999).

JURISDICTION

4. This Court has exclusive original jurisdiction over this Complaint pursuant to Art. III, § 2, cl. 2 of the Constitution of the United States and 28 U.S.C. § 1251(a).

SUMMARY

5. This action is brought by the Commission for violation of the member States' rights under the Compact, breach of contract, bad faith/deceit, unjust enrichment, promissory estoppel and money had and received against the State of North Carolina. North Carolina was a member of the Southeast Interstate Low-Level Radioactive Waste Management Compact and properly was designated as the next host State for the construction of a regional low-level radioactive waste disposal facility. In order to ensure that North Carolina would locate an appropriate site and construct an adequate facility, the Commission contributed nearly $80 million to North Carolina. Over the course of more than ten years, North Carolina accepted the funds, conducted some preliminary search and analysis efforts to locate an appropriate site, but never even issued the necessary license for the project, let alone completed construction of the facility. The other member States to the Compact were harmed not only by the fact that they found themselves without a site within their region at which to dispose of low-level radioactive waste, but also because close to $80 million of the Commission's funds were converted by North Carolina without North Carolina fulfilling its obligations undertaken pursuant to the Compact.

FACTUAL BACKGROUND

6. The Southeast Interstate Low-Level Radioactive Waste Management Compact (the "Compact") was consented to by the United States Congress on January 15, 1986, as part of the Omnibus Low-Level Radioactive Waste Compact Consent Act. Pub. L. No. 99-240, Tit. II, 99 Stat. 1859 (1986).

7. The original member States to the Compact were Alabama, Florida, Georgia, Mississippi, North Carolina, South Carolina, Tennessee and Virginia.

8. The Compact was designed to provide "the instrument and framework for a cooperative effort" to provide sufficient facilities for the proper management of low-level radioactive waste generated in the region.

9. To assist in the implementation of the Compact's objectives, the Compact, by its terms, created the Southeast Interstate Low-Level Radioactive Waste Management Commission (the "Commission"), consisting of two voting members from each member State.

10. Among the Commission's duties was to identify a host State for the development of the second regional disposal facility. The first regional disposal facility was located in Barnwell County, South Carolina. Pub. L. No. 101-171, sec. 2, Art. 7(H), 103 Stat. 1289, 1289 (1989).

11. The Compact requires that each member State designated as a host State take appropriate steps to finance, site, license and construct the necessary disposal facility.

12. The Compact expressly states that the Commission "is not responsible for any costs associated with: (1) the creation of any facility . . . ." Compact, Art. 4(K), 99 Stat. at 1876.

13. The Compact also vests in the Commission the power to impose sanctions upon member States that fail to comply with the provisions of the Compact or that fail to fulfill the obligations incurred by becoming a member State to the Compact. Compact, Art. 7(F), 99 Stat. at 1879.

THE PRESENT CONTROVERSY

14. In September 1986, following a lengthy screening and review process by the Commission and outside consultants, North Carolina was designated as the second host State.

15. In August 1987, the North Carolina General Assembly recognized the reasonableness of this designation by creating and funding the siting authority for the project: the North Carolina Low-Level Radioactive Waste Management Authority (the "North Carolina Authority"). N.C. Gen. Stat. § 104-G (repealed eff. July 1, 2000). The facility was targeted to be completed by January 1, 1993.

16. Although not obligated to do so, the Commission determined in 1988 that it was prudent for it to provide financial assistance to the designated host State – North Carolina – to assist with planning and administrative costs. Thus began a series of requests for funds by North Carolina and decisions by the Commission to provide these funds to assist North Carolina in this

endeavor. In total, the Commission paid $79,930,337 to North Carolina.

17. In December 1988, Governor Campbell of South Carolina notified the Commission that the Barnwell facility would cease to serve as the regional disposal facility on December 31, 1992.

18. In July 1990, the North Carolina Authority notified the Commission that it would not meet the January 1, 1993 scheduled opening date for the facility. Instead, completion of the project was estimated to take an additional two years and cost close to twice as much to complete.

19. In October 1991, the North Carolina Authority notified the Commission that it would not meet its revised target date for opening the facility. Instead, the site was scheduled to open in February 1996.

20. In June 1992, at the request of the Commission which was prompted by delays with the North Carolina facility, the South Carolina legislature voted to allow the Barnwell facility to remain open as the regional disposal site until January 1, 1996.

21. In August 1994, the North Carolina Division of Radiation Protection, the State entity responsible for issuing the license for the disposal facility, announced there would be a 15-month delay in the licensing process, further postponing the scheduled opening of the facility until at least June 1997.

22. In December 1994, the North Carolina Authority approved an additional one-year delay, postponing the scheduled opening until June 1998.

23. In May 1995, the Commission met twice to consider a South Carolina proposal to extend the operation of the Barnwell facility, conditioned upon the denial of North Carolina's access to the facility until North Carolina issued a license for the new facility. The proposal was voted upon twice, and each time failed by a single vote.

24. In July 1995, South Carolina withdrew from the Compact.

25. South Carolina's withdrawal from the Compact eliminated the Commission's existing source of revenue to fund its operations as well as site development activities – the levying of fees and surcharges on waste disposed of at the Barnwell facility. The Commission's only remaining source of funding was interest on its accrued funds.

26. Because the Commission no longer had a revenue stream from which to provide funding assistance to North Carolina and because the projected expenses to complete the project exceeded the Commission's remaining funds, the Commission notified North Carolina in January 1996 that North Carolina should consider alternative funding opportunities.

27. In June 1996, Governor James B. Hunt, Jr. of North Carolina informed the Commission that North Carolina would not fulfill its existing commitment to pay the project costs. Governor Hunt attempted to put the burden on the Commission, contrary to the clear language of the Compact, to fund the project.

28. In June 1996, the North Carolina Authority adopted a Licensing Work Plan under which the facility would not open until at least 2001.

29. In 1997, because other attempts to resolve the funding problem had failed, the Commission organized a Task Force for Facility Funding (the "Task Force") to study the funding issue and recommend funding alternatives. The Task Force included volunteer representatives of the North Carolina Authority, the Commission, waste generators and the public.

30. In August 1997, the Commission submitted to Governor Hunt a proposed Memorandum of Understanding that had been drafted by waste generators based upon the recommendations of the Task Force. The proposal called for the Commission and volunteer generators to fund the remainder of the licensing costs. The Commission asked the North Carolina Authority either to approve the proposal or to propose any other method of funding by December 1, 1997, or the Commission would cease to provide funding to North Carolina.

31. By December 1, 1997, North Carolina had neither endorsed the proposal nor proposed an alternative funding plan. Instead, the Chairman of the North Carolina Authority notified the Commission of the Authority's decision to begin shutting down the project pending instructions from the North Carolina Legislature or the Commission's reversal of its position regarding funding.

32. In January 1998, the Commission notified the North Carolina Authority that the shut down constituted a breach of the Compact by North Carolina.

33. In April 1999, the Commission again notified North Carolina that it was in breach of the Compact and requested that North Carolina provide a written plan and schedule for North Carolina to bring itself into compliance with the Compact and to provide a disposal facility for the region. North Carolina did nothing.

34. In June 1999, the States of Florida and Tennessee filed a Sanctions Complaint against North Carolina with the Commission. The Sanctions Complaint alleged that North Carolina had failed to fulfill its obligations as a member State and as the designated host State by not providing a disposal facility for the region. The Sanctions Complaint sought, among other things, the disgorgement of the $79,930,337 that the Commission had provided to North Carolina to assist in the licensing and development of the disposal facility, plus interest from the date North Carolina ceased activity to develop the requisite facility, January 1, 1998.

35. In July 1999, North Carolina purported to withdraw from the Compact, pursuant to Article 7(G).

36. In August 1999, the Commission adopted the recommendation of the Sanctions Committee to initiate a formal inquiry into the complaint filed against North Carolina.

37. On November 8, 1999, the Commission formally notified North Carolina of the Sanctions Hearing to be held on December 8, 1999.

38. On December 1, 1999, the Attorney General of North Carolina, Michael F. Easley, informed the Commission that North Carolina would not participate in the

Sanctions Hearing, taking the position that having withdrawn from the Compact, North Carolina no longer was subject to the jurisdiction of the Commission. North Carolina effectively waived its rights under the Compact.

39. The Commission held a Sanctions Hearing on December 8, 1999. The Commission heard testimony and received evidence from all interested parties, except for North Carolina, which persisted in its refusal to participate in the process and thus knowingly waived its rights.

40. On December 9, 1999, by a unanimous vote, the Commission found that North Carolina had failed to fulfill its obligations under the Compact and voted to require North Carolina to repay the $79,930,337 in funds it had received from the Commission, plus interest from the date North Carolina ceased activities to develop the requisite facility, January 1, 1998. The Commission also voted to require North Carolina to pay $10 million in sanctions, as compensation for the loss of a source of funds for the Commission's operating budget for 20 years, and attorneys' fees. North Carolina was given until July 10, 2000 to comply with this order.

41. The July 10, 2000 deadline has passed. North Carolina neither repaid the funds nor gave the Commission any indication of its intent to do so.

42. North Carolina's actions and failures to act violate North Carolina's obligations under the Compact and otherwise create common law rights for return of the monies paid to North Carolina by the Commission.

COUNT I – VIOLATION OF MEMBER STATES' RIGHTS UNDER THE COMPACT

43. Plaintiff hereby realleges Paragraphs 1 through 42 as if fully set forth herein.

44. As alleged, the Compact is an agreement among the States that has the force of federal law. The Compact imposes an express statutory obligation on the member States to fulfill their obligations to fund, construct and operate a regional disposal facility when such State is designated as the host State.

45. North Carolina was designated as the host State, but failed to fund, license, construct or operate a regional disposal facility. North Carolina's actions constitute a violation of the member States' rights under the Compact.

46. As a result of North Carolina's violation of its obligations under the Compact, Plaintiff and the member States have suffered and will suffer significant monetary damages, including the loss of $79,930,337 paid to North Carolina in furtherance of the project, the loss of a regional disposal facility and the loss of a source of funds for the Commission's operating budget.

COUNT II – BREACH OF CONTRACT

47. Plaintiff hereby realleges Paragraphs 1 through 46 as if fully set forth herein.

48. As alleged, the Compact is a federal law and is a legally binding and enforceable contract.

49. Under the contract, North Carolina was obligated, as the designated second host State, to site, license, construct and operate a regional low-level radioactive waste disposal facility.

50. The allegations contained hereinbefore constitute breaches of said contract by North Carolina.

51. As a direct result of these breaches, Plaintiff and the member States have suffered and will suffer substantial monetary damages, including the loss of $79,930,337 paid to North Carolina in furtherance of the project, the loss of a regional disposal facility and the loss of a source of funds for the Commission's operating budget.

COUNT III – BAD FAITH/DECEIT

52. Plaintiff hereby realleges Paragraphs 1 through 51 as if fully set forth herein.

53. North Carolina represented to the member States in the Compact and to the Commission that it would, consistent with its obligations as the next host State, fund, license, develop and operate a regional low-level waste disposal facility in North Carolina.

54. North Carolina knew or should have known when it represented that it would fulfill its obligations as host State that those representations were false, because North Carolina never intended to provide the facility.

55. The representations were false and material, and intended to induce the member States and the Commission to act in reliance thereon.

56. The member States and the Commission reasonably relied on these false representations when determining to provide funding assistance to North Carolina. Plaintiff would not have paid nearly $80 million to North Carolina in furtherance of the project had it known the representations were false.

57. As a result of this bad faith/deceit, Plaintiff and the member States have suffered and will suffer substantial monetary damages, including the loss of $79,930,337 paid to North Carolina in furtherance of the project, the loss of a regional disposal facility and the loss of a source of funds for the Commission's operating budget.

COUNT IV – UNJUST ENRICHMENT

58. Plaintiff hereby realleges Paragraphs 1 through 57 as if fully set forth herein.

59. North Carolina received close to $80 million from the Commission to be used for the licensing and development of the next regional disposal facility.

60. North Carolina acknowledged the funds received from the Commission, and even repeatedly demanded that the Commission provide additional funds.

61. North Carolina has retained the nearly $80 million it received from the Commission, despite the fact that North Carolina failed to deliver the regional disposal facility it was obligated as the next host State to provide.

62. As a result, North Carolina has been unjustly enriched in an amount equal to $79,930,337 and should be ordered to pay this amount in restitution to Plaintiff.

COUNT V – PROMISSORY ESTOPPEL

63. Plaintiff hereby realleges Paragraphs 1 through 62 as if fully set forth herein.

64. As alleged, North Carolina accepted the designation of host State and through its governors repeatedly confirmed that it would provide a facility, thereby promising the other member States that it would construct and operate a regional disposal facility in North Carolina.

65. The member States and the Commission reasonably and foreseeably relied upon North Carolina's promise to construct and operate a regional disposal facility.

66. North Carolina unjustifiably failed to construct and operate a regional disposal facility.

67. Plaintiff and the member States have suffered and will suffer significant harm as a result of their reliance on North Carolina's promise, including the loss of $79,930,337 paid to North Carolina in furtherance of the project, the loss of a regional disposal facility and the loss of a source of funds for the Commission's operating budget.

COUNT VI – MONEY HAD AND RECEIVED

68. Plaintiff hereby realleges Paragraphs 1 through 67 as if fully set forth herein.

69. As alleged, North Carolina has received $79,930,337 from the Commission.

70. These funds were intended to further the completion of the construction of a regional disposal facility in North Carolina.

71. The regional disposal facility in North Carolina never was constructed.

72. North Carolina has retained the $79,930,337 from the Commission, in exchange for which the Commission has received nothing.

73. North Carolina, in equity and good conscience, should pay over to the Commission $79,930,337.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff prays that the Court:

1. Declare that North Carolina is subject to the jurisdiction of the Commission and subject to the Commission's sanctions decision, despite North Carolina's purported attempt to withdraw from the Compact on July 26, 1999.

2. Declare that the Sanctions Hearing conducted by the Commission was fair and valid.

3. Declare that the sanctions against North Carolina imposed by the Commission upon receipt of all evidence in the Sanctions Hearing was fair and reasonable and is subject to enforcement.

4. Award Plaintiff such damages, costs and further relief as this Court deems just and proper.

Respectfully submitted,

HENRY W. JONES, JR.
JORDAN PRICE WALL GRAY JONES & CARLTON
225 Hillsborough Street, Suite 200
Raleigh, North Carolina 27602
(919) 828-2501

Of Counsel

CARTER G. PHILLIPS*
COLLEEN M. LAUERMAN
SIDLEY & AUSTIN
1722 Eye Street, N.W.
Washington, D.C. 20006
(202) 736-8000

Attorneys for Plaintiff

**Counsel of Record*

July 10, 2000

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APPENDIX A

RESOLUTION

Whereas, the Southeast Compact Commission (the "Commission") is charged by Article 4(E)6 of the Southeast Interstate Low-level Radioactive Waste Management Compact (the "Compact") with the duty of identifying a host state for the development of a second regional disposal facility and seeking to ensure that "such facility is licensed and ready to operate as soon as required but in no event later than 1991"; and

Whereas, the Commission is charged by Article 4(E)4 of the Compact with the duty of developing procedures for determining, "consistent with consideration for public health and safety, the type and number of regional facilities which are presently necessary to manage waste generated within the region"; and

Whereas, the Commission, although not obligated to do so under the Compact provisions, deems it appropriate and necessary to provide financial assistance to any state duly designated as the next host state for the initial planning and administrative costs and other preoperational costs associated with that state's obligation to create and operate a regional facility in accordance with Article 3 of the Compact; and

Whereas, the Commission has appropriated, in its annual budget for the fiscal year July 1, 1986-June 30, 1987 the sum of $200,000, designated as a "State Assistance Trust Fund," to be used for the aforesaid purposes; and

Whereas, the Commission intends to appropriate the same or similar amounts in future annual budgets for the same aforesaid purposes, * * *

* * *

* * * an independent certified public accountant, whose report shall be made available to the Finance Committee and to the Commission.

7. After approval by the Finance Committee, the Executive Director is authorized to make payments and disbursements from the Fund only for the purposes set forth in Paragraph 1 of this Resolution and in accordance with the By Laws of the Southeast Compact Commission. Payments and disbursements shall be made only on application by the duly designated agency of the next host state.

8. Each application by the duly designated agency of the next host state shall be on a form approved by the Executive Director. The application shall state in full the reasons and the need for the requested payment and the precise purposes for which the requested payments will be used.

9. No application will be received from, and no payments from the Fund will be made to, any private individual, organization or corporation.

10. In the event that the Finance Committee decides not to authorize payments as requested by the duly authorized agency of the next host state, that agency may request the full Commission to review and reconsider the decision. The Commission's decision shall be final.

Adopted February 9, 1988
Biloxi, Mississippi

APPENDIX B

MINUTES
SOUTHEAST COMPACT COMMISSION
October 24, 1989
Page Five

Report from Host State Identification Committee

Ms. Barbara Wrenn, Chairman, reported that the Host State Identification Committee last met on September 26, 1989 in Nashville, Tennessee, to become more acquainted with the generator survey report of the Technical Advisory Committee. She stated that Commissioner Mobley made a report indicating that waste reduction continues. The Host State Identification Committee continues to look at the criteria for selecting the next host state. The distinction between volume and curies may become more important in the next selection because while the volumes are reducing drastically, curies are not. This may be something to be weighed differently in the next selection process.

In the southeast region, it is not anticipated that the generators will have 32 million within the next 20 years. The threshold for closure for the North Carolina facility is either 20 years of operation or 32 million feet, whichever comes first. It [sic] not anticipated that we will need a third regional disposal facility in operation before the two decade period. The committee will continue to study the criteria within the parameters expected by the state of North Carolina.

Commissioner Godwin questioned whether the decrease in volume would affect the financing of future facilities.

Ms. Wrenn indicated that this was a finding of the committee since the financing heretofore was based on volume. It may be necessary in the future to alter the financing of the facility.

Report of the Public Participation Committee

Commissioner Ben Smith reported that the Committee recommends having an annual event for legislators to inform them of the work of the Compact. He presented a proposed budget and agenda for the event. Upon a motion by Mr. Smith, the Commission voted unanimously to proceed with the conference plans and to expand the Commission budget to include $55,000 for the annual conference, targeting the summer of 1990 for the first conference.

Commissioner Bailey questioned whether more than two legislators could attend. Mr. Smith said it would certainly be welcome if paid for by that state.

It was suggested that, in addition to the planned conference for southeast legislators, the Southern Legislators' Conference would be a good avenue for exposure, such as a booth, exhibit or reception.

Report from the Finance Committee

Capt. Briner presented the following recommendation to the Commission in the form of a motion.

> The Finance Committee recommends that the Commission approve the development of a site development charge for the purpose of repayment of a Capacity Assurance Charge and direct the Finance Committee to proceed with

the development of a methodology for its implementation.

[Page Six]

Mr. Smith discussed repayment of the charge in reference to generators who [sic] will not be operating in the future and the volumes for those currently disposing of waste will vary. He suggested that there be a payback of the Capacity Assurance Fee and to provide some incentives so that there will not be stockpiling of waste and excessive storage.

There was discussion from several Commissioners in reference to the Capacity Assurance charge and potential payback.

By unanimous vote, the motion was approved.

A proposal to implement a Capacity Assurance Charge was then presented by Captain Briner (see "Summary Description of Capacity Assurance Charge"). The meeting was briefly recessed so that everyone could look over the proposal before voting.

When the meeting was reconvened, a roll call vote was taken, and the proposal was adopted with no opposition.

Report from Commissioner Shealy

Commissioner Shealy reported on the judgment of compliance with the milestones in the Low-Level Waste Policy Amendments Act. In reference to the July 1, 1988 milestone where a host state had to be identified and siting plans submitted, Puerto Rico and three states were

not in compliance. Rapidly approaching is the January 1, 1990 milestone which requires that a complete license application be submitted to the Nuclear Regulatory Commission or an agreement state, whichever applies. Mr. Shealy further discussed the option of Governor certification. Mr. Shealy submitted a Guidance Document for determining compliance with the third milestone, to be entered into the minutes of the meeting. This document contains four key elements that the three host states (Nevada, Washington, and South Carolina) feel should be in the governors' certifications. Currently only one draft Governor's certification has been received (from the Midwest Compact). He also pointed out that the Governor's certification is to be submitted to the U.S. Regulatory Commission.

Dr. Howell questioned whether the South Carolina site would definitely be closed, internally and externally. John McMillan answered that the site would be closed on the regional facility, but South Carolina has the option to use it for their own waste.

Commissioner Cynthia Bailey made the following motion, which was unanimously approved.

> That the Commission defer to South Carolina's judgement on the enforcement of other milestones as regards access to the regional facility but reserving any independent authority the Commission might have for the future accessment.

SUMMARY DESCRIPTION OF CAPACITY ASSURANCE CHARGE

Adopted October 24, 1989

1- Name

This special fee on all current southeastern users of the Barnwell, S.C. disposal facility shall be denominated as a "Capacity Assurance Charge".

2- Purpose

To assure the timely development of the second regional disposal facility in North Carolina by furnishing additional funds to the Southeast Compact Commission ("Compact") for utilization by the NC Low-Level Radioactive Waste Management Authority ("Authority"). These funds will go to support the licensing phase of North Carolina's site development. In this phase a site will be selected and a license to build and operate the facility will be obtained. This will assure the availability of a site for all southeast generators and thus this fee is a future disposal capacity assurance charge.

3- Who Pays the Charge

All southeast low-level radioactive waste generators using the Barnwell, South Carolina disposal facility.

4- Basis for Calculating the Charge

A cubic foot charge for volumes disposed at the Barnwell, S.C. disposal facility.

5- Duration

Beginning January 1, 1990 and continuing for so long as necessary to accumulate a total of $21.4 million, which funds shall be utilized to partially defray the cost of site selection and licensing of a

new regional disposal facility in North Carolina, or a license is granted, whichever first occurs. In no event will the charge be collected later than December 31, 1992, due to the closure of the regional facility in Barnwell, South Carolina.

Projected charges would yield $9 million per year based upon 450,000 cubic feet at $20/cubic foot.

6- Exemptions

None

7- Specific Power of the Compact to Allocate Funds to NC

It is the duty of the Commission to "provide the party states with reference guidelines for establishing the criteria and procedures for evaluating alternative locations for emergency or permanent regional facilities." [Article 4(E)5.]

The Compact Commission shall seek to ensure that [the new regional facility in NC] is licensed and ready to operate as soon as required . . . [Article 4(E)6.]

"It is the policy of the party states to: enter into a regional low-level radioactive waste management compact for the purpose of providing . . . sufficient facilities for the proper management of low-level radioactive waste generated in the region; . . . [and to] distribute the costs, benefits, and obligations of successful low-level radioactive waste management equitably among the party states . . . " [Article 1]

8- Specific Power of the Compact to Accept Funds from the State of South Carolina

"The Commission may accept for any of its purposes and functions any and all donations, grants of money . . . from any state . . . or from any institution,

person, firm, or corporation, and may receive, utilize, and dispose of the same." [Article 4J.]

9- Specific Power of the SC Budget and Control Board to Impose, Collect, and Disburse Proceeds from Charges

"Each state hosting a regional disposal facility shall annually levy special fees or surcharges on all users of such facility, based upon the volume of wastes disposed of at such facilities, the total of which: a. must be sufficient to cover the annual budget of the Commission . . . " [Article 4H.2.]

Sec. 13-7-30 of the SC Code specifically empowers Budget and Control Board to impose, collect and disburse special fees or surcharges.

10- Specific Power of the Authority to Accept Funds From the Compact

NCGS 104G-6a(13) expressly authorizes the Authority to apply for, accept and expend grants of money from a compact commission for any purpose authorized by the enabling statute creating the Authority.

11- Purposes for Which the Authority May Expend the Proceeds from these Charges

The Authority is granted broad powers to do anything necessary and proper to site, design, construct, and operate a disposal facility either itself or through a private operator. [NCGS 104G-6 and 104G-10].

12- How Will the Charges Be Determined

The Authority shall submit to the Compact an annual budget projecting costs associated with paying the operating and maintenance expenses of the Authority, the costs of paying the Authority's contractors or consultants, and the costs of reimbursing

NC agencies for their expenses incurred on behalf of or in support of the Authority.

The Compact shall transmit its own budget to the SC Budget and Control Board and shall include the amount requested by the Authority.

The SC Budget and Control Board shall determine the volume charge annually based upon estimated totals from southeastern generators.

13- Adjustments in annual volume charge

The charge shall be reviewed by the Southeast Compact Commission at least on an annual basis and may be adjusted due to changes in volumes.

14- How will charge be collected

The Barnwell site operator will collect the charge from all southeastern generators based upon disposed volumes.

The site operator will transmit the proceeds to the South Carolina State Treasurer who shall then transmit the funds to the Compact. For further detail, see "Attachment A: Procedure For Collection of Proposed Capacity Assurance Charge"

15- How will the funds be disbursed

The Authority will periodically submit an invoice to the Compact for payment from the accumulated funds derived from these charges. See "Attachment B: Procedure For Expenditure of the Proposed Capacity Assurance Charge Funds"

16- What controls will be placed on the use of these funds by the Authority

No payments shall be made by the Authority absent express or implied statutory authority in its enabling legislation for the specified purpose.

Payments to Chem-Nuclear Systems, Inc. will be subject to the exact terms and condition contained in their written contract with the Authority.

Chem-Nuclear shall submit a work plan based upon milestones and schedules approved by the Authority. Invoices submitted by Chem-Nuclear shall be consistent with the approved work plan.

The Authority will implement a comprehensive monitoring and quality assurance program to support management and oversight of its contracts with Chem-Nuclear and others.

The Authority shall approve all service agreements and other obligations incurred on its behalf or in support of the Authority by other state agencies and contractors.

17- What mechanisms are available to the Compact to enforce compliance

The same generic sanctions to assure good faith compliance shall also be available to enforce these guidelines and policies.

Misuse, misapplication or misappropriation of funds provided by the Compact to the Authority shall also be subject to all the same legal remedies ordinarily available to parties.

18- Who will audit the receipt and expenditure of these funds

The Authority's books and records shall be subject to an annual audit by the North Carolina State Auditor in addition to those administrative policies and controls imposed by its parent department, the North Carolina Department of Administration.

The results and written reports of audits for these governmental entities are public information and subject to inspection.

19- What priority will be used for applying the proceeds from these charges relative to state fund appropriations granted the Authority

As proceeds from these charges are collected from the Compact and deposited with the North Carolina State Treasurer, they will first be utilized to pay current or past obligations of the Authority. To the extent these charges are insufficient to pay the Authority's obligations, appropriated State funds shall be used. At the end of the licensing phase, any unexpended operating funds appropriated by the North Carolina General Assembly to the Authority shall revert to the State's General Fund.

Based upon current projections, available funds derived from the capacity assurance charges and state appropriations are expected to be adequate to pay all licensing expenses associated with the project.

Any and all costs that are not otherwise paid by the generators from these charges shall ultimately be repaid to the State of North Carolina with interest once the facility becomes operational. To maintain an accurate account of the total cost of developing and establishing the regional disposal facility, the Authority shall maintain a ledger showing the total amount of funds expended from the NC General Fund that are not otherwise recovered from these generator charges.

20- Documentation of Cost Projections

Attachment C indicates expenditure projections for the licensing phase from November 1, 1987 through December 31, 1991 of $13,732,702 for the Authority

and the State agencies associated with the regulatory and licensing aspects of the project. In addition, the Authority's prime developer/operator contractor, Chem-Nuclear Systems, Inc., began work under their contract on July 28, 1989 and their projected licensing expenditures are included in this exhibit totalling $20,879,692.

The General Fund Appropriation from the North Carolina General Assembly to the Low-Level Radioactive Waste Management Authority and the other State agencies directly involved in the project totals approximately $17,400,000 for the 1989-1991 biennium. *The money is designated to be used only when there are no other funds available for this project.* The total of all projected expenditures from the first anticipated date of receiving Capacity Assurance Funds in April 1990, through the receipt of the license on December 31, 1991 is approximately $21,000,000.

ATTACHMENT A

DRAFT PROCEDURE FOR COLLECTION OF PROPOSED CAPACITY ASSURANCE CHARGE

Step 1 The N.C. Low-Level Radioactive Waste Management Authority (Authority) submits a budget to the Southeast Compact Commission (Commission) for the current budget period (i.e. January 1, 1990 to June 30, 1990). In subsequent years, the Authority submits an annual budget to the Commission.

Step 2 After approval, the Commission submits this budget to the South Carolina Budget and Control

Board as an amendment to its budget for the purposes of assisting North Carolina in the licensing phase of site development.

Step 3 The South Carolina Budget and Control Board sets the amount of the charge per cubic foot based on the budget of the Authority divided by the number of cubic feet which Chem-Nuclear Systems, Inc. (CNSI) expects to dispose for Southeast generators over the same time period.

Step 4 For each shipment of waste disposed at Barnwell by Southeast generators, CNSI calculates the amount of the charge owed by the generator and bills the generator for this amount on the routine invoice. The charge will be due to CNSI on payment of the invoice (45 days is an average period for payment). Note: the capacity assurance charge will *not* be built into the base charge since it does not apply to generators outside the Southeast.

Step 5 Once a month, CNSI submits to the S.C. Treasurer's office the amount of charges collected from generators over the past month.

Step 6 Once a month, the S.C. Treasurer's Office transmits funds to the Commission for the amount of charges submitted by CNSI that month. This check will be separate from the check for the Commission's operating budget.

Step 7 The capacity assurance charge funds are deposited into an account held separate from the Commission's operating funds.

Step 8 Upon approval of an invoice from the Authority (see "Draft Procedure for Expenditure of the Proposed Capacity Assurance Charge Funds"), the Commission transmits funds to the Authority.

Step 9 CNSI ceases billing generators for the capacity assurance charge at the point in time when they have collected a total of $21,400,000.

ATTACHMENT B

DRAFT PROCEDURE FOR EXPENDITURE OF THE PROPOSED CAPACITY ASSURANCE CHARGE FUNDS

1. Chem-Nuclear Systems, Inc. (CNSI), other contractors and other state agencies invoice the N.C. Low-Level Radioactive Waste Management Authority (Authority) for completed tasks, in accordance with the Work Plan.

2. The Authority invoices the Southeast Compact Commission (the Commission) with an itemized list of work performed by CNSI, other contractors, other state agencies, and the Authority staff.

   The Authority certifies to the Commission Executive Director that the work has been performed and that the work corresponds to the Authority's Work Plan or other legal obligations of the Authority.

4. As soon as possible, but in no event later than ten days after the receipt of the Authority's invoice, the Commission mails a check to the Authority. The check is co-signed by the Commission Executive Director and Secretary-Treasurer. If the amount of the invoice exceeds the amount of capacity assurance charges collected to that date and remaining in the account, the check will be made for no more than the amount remaining in the account.

5. Payments to the Authority shall be deposited in a special segregated fund maintained by the North Carolina State Treasurer. Checks drawn by the Authority shall be debited against the special account.

6. At each Commission meeting, the Authority provides a thorough report of the progress made toward its Work Plan.

APPENDIX C

MINUTES
SOUTHEAST COMPACT COMMISSION
November 15, 1990
Page Five

Commissioner Smith presented three factors that would produce a more successful and cost effective conference which are (1) greater commissioner involvement in working with legislators, (2) repeating the conference location, and (3) avoidance of unnecessary changes to the format and written materials.

The Committee also recommended that this conference not be joined with a commission meeting. The Committee felt that there would be too many conflicts.

In reference to hiring an outside consultant to facilitate the conference, the Committee asked Secretary-Treasurer Captain William Briner and Ben Smith to form a subcommittee to review the consultant's work plan prior to execution of a contract.

In regard to the scheduling of the conference, several dates were offered. September 15 and 16 were chosen for the conference.

Chairman Hodes emphasized early follow-up with legislators on registration for the conference.

New Commissioner W. Tayloe Murphy was appointed as a member of the Public Participation Committee.

Report of *the Finance Committee*

A. Financing of Regional Facility Development

Captain William H. Briner, Chairman of the Finance Committee, called on Commissioner George Miller, who had chaired a special subcommittee appointed to review the proposal presented in an August 21, 1990 memorandum by South Carolina commissioners, John McMillan and Heyward Shealy. Chairman Briner commended Rep. Miller and others involved for the hard work expended in in [sic] this effort.

Commissioner Miller made the following motion:

The Finance Committee recommends that the Commission establish an access fee as outlined in the August 21, 1990 memorandum to the Commission from Commissioners McMillan and Shealy, as amended (see Attachment A).

Notwithstanding, in the event a member state does not establish a mechanism which provides compensation for the access fee within the time provided, the host state shall assess and collect the fee based on volume on an equitable basis for all waste from that state, to be paid by the generators.

The motion was seconded by John McMillan.

Commissioner Ben Smith stated that the original figures from the August 21, 1990 memorandum would have to be adjusted. Chairman Hodes indicated that these figures would be corrected.

Alternate Commissioner Palmer from Mississippi addressed the fact that this motion covers only the first

two years, implying that the issue must be revisited for the balance of funds needed.

Captain Briner responded affirmatively to Commissioner Palmer's concern.

Commissioner Godwin requested that "equitable basis" be stated as volume per facility.

Commissioner Miller moved to amend his motion to indicate that they are not authorizing a financial commitment on behalf of the states themselves. Each state is to establish a mechanism for collecting the access fee. If this is not done, the host state will assess the fee. The word "equitable" is to be substituted to read "equal".

Seconded by Captain Briner.

The amendment was approved unanimously.

Commission [sic] Setser, speaking to the motion, reiterated that this does not imply that the Commission is placing a financial liability on the state itself.

Commissioner stated that the process is to be put into place on January 1, 1991.

The motion as amended was voted on by roll call. The affirmative vote was unanimous.

Commissioner Miller thanked South Carolina for submittal of the proposal and expressed appreciation of the member states in regard to the financial burden of this project. Commissioner Briner thanked the commissioners for their efforts and Commissioner Hodes thanked Captain Briner for his work with the Finance Committee on this issue.

B. Prudence Evaluation

Captain Briner stated that the Finance Committee recommends that a professional services contract be made with Ernst & Young for a diagnostic evaluation of the North Carolina Low-Level Radioactive Waste Management Authority's costs. The cost for this evaluation will approach $50,000.

The commissioners discussed the motion. Alternate Commissioner Palmer asked for clarification on the need for the contract.

Commissioner Smith indicated that possibly this evaluation will give suggestions for stretching the funds over a longer period of time and ways to possibly cut costs.

Commissioner Godwin would like indication that these are reasonable expenses.

Attachment A

(text of 8/21/90 memorandum, amended 11/15/90)

As you know, the Southeast Compact Finance Committee has been discussing the concept of establishing an access fee in addition to the current capacity assurance charge for collecting revenues to develop the second regional disposal facility for the Southeast Compact.

The suggested alternative places too great a burden on generators who are trapped in a fixed price situation with little if any ability to adjust prices to absorb major increases in cost. As a result, these generators will either reduce shipping by utilizing expanded storage or, in extreme cases where storage is not a viable option, go out

of business. We do believe an access fee alternative is an option, but only if implemented in an equitable manner. We also believe each member state of the Compact is best suited for determining the most equitable means for developing this system.

Article 3(B) of the Southeast Compact is the appropriate provision for the establishment of a mechanism for access fees: "if no operating regional facility is located within the borders of a party state and the waste generated within its borders must therefore be stored, treated, or disposed of at a regional facility in another party state, the party-state without such facilities may be required by the host state or states to establish a mechanism which provides compensation for access to the regional facility according to terms and conditions established by the host state or states and approved by a two-thirds vote of the Commission."

South Carolina, as the host state to the regional facility is proposing all states in the Southeast Compact pay an annual access fee based upon proportional volumes from each state beginning with the last quarter of 1989 and the first three quarters of 1990, adjusted on a quarterly basis thereafter. Further, the state access fee is payable to the State of South Carolina beginning January 1, 1991 through December 31, 1992. The amount to be raised during this time period is $12 million.

This proposal will allow individual states to equitably adjust charges or fees for generators within their borders and allow implementation and administration of the access fee to be streamlined. Further, it is proposed any access fees collected by South Carolina and invested in

the North Carolina Low-Level Radioactive Waste Management Authority be returned in the form of a user credit after the opening of the next host state facility.

RESOLUTION TO ESTABLISH AN ACCESS FEE ON SOUTHEAST GENERATORS FOR THE PERIOD JANUARY 1, 1993 – DECEMBER 31, 1995

Adopted by the Southeast Compact Commission
November 13, 1992

In order to assure the continued development of the second regional disposal facility for low-level radioactive waste ("LLRW") in North Carolina, the Southeast Compact Commission ("Commission") must take appropriate action to furnish additional funds for use by the North Carolina Low-Level Radioactive Waste Management Authority ("Authority"). These funds will go to support the licensing phase of site development in North Carolina. Development of the North Carolina facility will assure the availability of a disposal site for all Southeast generators.

The Commission has established a policy for the importation of out-of-region waste, including the imposition of an import fee. However, the volume of out-of-region LLRW and the amount of revenue generated from out-of-region LLRW is uncertain. The North Carolina siting process must move forward independent of any policy related to, or revenue derived from the importation of out-of-region LLRW. Because the cash flow requirements

of the Authority must be met in a timely manner during 1993-1995, fees will be assessed on all Southeast LLRW generators during that period.

The Finance Committee recommends that the Commission establish an access fee, to be levied on all Southeast LLRW generators at a rate sufficient to raise $3 million per quarter for a total of $36 million over the three year period, January 1, 1993-December 31, 1995. Fee collection shall be in accordance with the attached "Mechanism to Collect Revenues During the Period January 1, 1993-December 31, 1995 for Continued Development of the Second Regional Disposal Facility for the Southeast Compact Region."

MECHANISM TO COLLECT REVENUES DURING THE PERIOD JANUARY 1, 1993 – DECEMBER 31, 1995 FOR CONTINUED DEVELOPMENT OF THE SECOND REGIONAL DISPOSAL FACILITY FOR THE SOUTHEAST COMPACT REGION

An access fee will be collected during the three year period January 1, 1993 – December 31, 1995 for the purpose of funding the continued development of the second regional disposal facility in North Carolina.

Article 3 (B) of the Southeast Compact is the appropriate provision for the establishment of a mechanism for an access fee:

> "if no operating regional facility is located within the borders of a party state and the waste

> generated within its borders must therefore be stored, treated, or disposed of at a regional facility in another party state, the party state without such facilities may be required by the host state or states to establish a mechanism which provides compensation for access to the regional facility according to terms and conditions established by the host state or states and approved by a two-thirds vote of the Commission."

Generators in all Southeast Compact states will be assessed an access fee based upon each state's percentage of Southeast Compact waste disposed at the Barnwell site during the previous twelve months. Further, the state access fee is payable to the State of South Carolina for the twelve quarters beginning January, 1993 and ending December 31, 1995. The amount to be raised during this time period is $3 million each quarter, for a total of $36 million.

Each state may establish a mechanism for determining the amount of access fee assessed against individual generators within that state. In the event a member state does not establish a mechanism for assessment, the host state shall assess and collect the fee based on the method described herein.

This mechanism will allow individual states to equitably adjust charges or fees for generators within their borders and allow implementation and administration of the access fee to be streamlined. Further, it is proposed any access fees collected by South Carolina and invested in the North Carolina Low Level Radioactive Waste Management Authority be returned to the generators in the

form of a user credit after the opening of the next host state facility.

Generators within states of the Southeast Compact will be assessed quarterly. Fees will be billed on the fifteenth day of the month immediately preceding the first day of each quarter in the assessment period. Generators shall be expected to pay such fees by the fifteenth day of the first month of each quarter, regardless of whether they plan to use the existing regional disposal facility in Barnwell, South Carolina during the quarter in question.

Access fees shall be calculated and collected by Chem-Nuclear Systems Inc. (CNSI) on behalf of the State of South Carolina. Fees shall be calculated and assessed according to the following procedures.

PROCEDURES

Fee Calculation and Assessment

The initial assessment will be based on the volume of waste disposed during the fourth quarter of 1991 and the first three quarters of 1992. The second assessment will be based on volumes of waste disposed during the first quarter 1992 through the fourth quarter 1992, and adjusted on a quarterly basis throughout the assessment period.

The total amount of access fees to be collected each quarter shall be determined by dividing the total amount of revenues needed by twelve quarters. Access fees will be apportioned first to each state and then assessed to each generator within the state based upon the mechanism established by that state.

On December 15, 1992, the first quarterly statement will be distributed by South Carolina for the Commission. Such statement shall show the total amount of the quarterly access fees apportioned to the state. The statement shall also include a breakdown of the quarterly volumes and the access fees to be assessed against each individual generator in each member state.

The total amount of the access fees apportioned to each member state for the quarter shall be determined by using historical disposal data from the Barnwell, South Carolina facility. The member state's share of the total shall be determined in the following manner:

1) Calculate the state's percentage of waste disposed at the Barnwell facility: Divide the volume of waste disposed by the state's existing generators at the Barnwell facility during the previous twelve months by the total volume of waste disposed at the Barnwell facility by all existing Southeast generators during the same period.

2) Multiply the state's disposal percentage by the total quarterly revenues to be assessed against all existing Southeast generators to determine the total access fees apportioned to that state.

Except in the case of a state which establishes a different mechanism, the quarterly access fees assessed against individual generators within the state shall be determined in the following manner:

1) Calculate the generator's percentage of the state's waste disposed at the Barnwell facility: Divide the volume of wastes disposed at the Barnwell facility by the individual generator

during the previous twelve months by the total volume of waste disposed by all the state's generators during the same period.

2) Multiply the generator's percentage of state waste disposed by the total state access fee to determine the quarterly fee assessed to the generator.

Data Requirements

The most recent available twelve months (four quarters) of disposal data from the Barnwell, South Carolina regional facility shall be used in all calculations of access fees. During quarterly adjustments of access fees, disposal data will be updated, omitting the oldest quarter and incorporating the most recent quarter.

Fee Administration

Generators will remit access fee payments to CNSI. The regional access fees received by the Southeast Compact Commission will be administered in accordance with the procedures for expenditures now in effect for the access fee.

Regional Facility Access Fee Enforcement

Generators who fail to remit access fee payments by the fifteenth day of the first month of each quarter shall be considered in violation of Article 3(B) of the Southeast Compact as stated above and will be subject to any or all of three sanctions:

1) Unpaid access fees will accrue interest at the rate of one percent per month until paid.

2) After being provided thirty days notice, generators may be denied access by the host state to the Southeast regional disposal facility until access fees and accrued interest are paid in full.

3) Generators may be denied certification to export wastes outside the Southeast region until fees and interest are paid in full. This applies only to waste not accepted at the Southeast regional disposal facility due to license requirements.

Appeals

An appeals process will be available to existing generators or states who believe access fees have been determined based upon erroneous disposal data. Appeals must be filed in writing to the Southeast Compact Commission Office within thirty days of billing. Collection of disputed access fees and the imposition of sanctions shall be stayed until the appeal is reviewed by the Commission. If disposal data is in error, revised charges are due 30 days after the new bill is mailed. Charges which are found to be proper during the review will be due (with interest at the rate detailed above) within thirty days of mailing of the appeal review results.

Exemptions

Any generator who shipped to Barnwell during the base period and who demonstrates to a subcommittee of the Finance Committee that it will not utilize a regional facility after 1992 will be excluded from the historical disposal data from the Barnwell facility that will be used for computing each state's share of the access fee. The subcommittee will consist of the Chairman of the Finance Committee, Commissioner Roberts and Commissioner Hodes.

Each state may provide for exemptions for other reasons through the mechanism it chooses for allocation of its share of the access fee to the generators within that state.

Contingencies

The collection of revenues for site development of the second regional disposal facility in North Carolina will be contingent upon the following:

All costs for site development incurred by the Authority are continually monitored and deemed reasonable and prudent by the Southeast Compact Commission;

The Southeast Compact Commission continually monitors and concurs that satisfactory progress is being made in the North Carolina site development process;

Any cost increases or schedule delays are immediately reported and justified to the Southeast Compact Commission by the Authority;

In the event that the revenue requirements from Southeast generators destined for site development by the

North Carolina Low-Level Radioactive Waste Management Authority have either increased or decreased and these changes are deemed reasonable and prudent by the Southeast Compact Commission, the Commission may elect to alter the total revenues collected by the Regional Facility Access Fee.

SUMMARY OF THE MECHANISM:

1. The purpose is to meet the cash flow requirements of the NCLLRWMA without relying on revenue derived from importation from out-of-region.

2. Continues the existing access fee mechanism with some "fine tuning" to address the problems encountered and clarify the original motion adopted 11/15/90.

3. Covers three year period January 1, 1993 – December 31, 1995.

4. Provides for assessment of $3 million per quarter, for a total of $36 million.

5. Does not include provision for the rollover of unpaid fees to the following quarters.

6. Provides for exemptions for those generators who are included in the base period data and who can demonstrate that they will not utilize the Barnwell facility after 1992 for purposes computing each states [sic] share of the access fee.

7. Includes clarification language on enforcement, appeals and contingencies which were not specifically included in the 11/15/90 motion.

8. Provides for faster more efficient transfer of fees from CNSI to South Carolina and on to the Commission.

APPENDIX D

COMMISSION MINUTES
September 28, 1992
Page Two

Approval of Minutes

The minutes of the August 14, 1992 meeting were approved as written.

Chairman Hodes asked for any comments related to agenda items. Ms. Janet Hoyle, Director of the Blue Ridge Environmental Defense Fund, a grassroots environmental organization in North Carolina, stated that people across North Carolina were becoming aware of political and economic pressures for fewer sites across the nation. Because North Carolina has been selected as the host state for the largest compact, they feel North Carolina is at great risk for becoming a national waste dump. She urged the Southeast Compact to ban the importation of waste from states or generators outside the region.

Mr. Lance Lloyd, representing GP Nuclear, stated that GP Nuclear has companies in two compacts. They are requesting that the import policy be changed to allow them to combine their wastes into one report. GP Nuclear is contributing approximately $7M towards this project.

Treasurer's Report

Captain William Briner, Chairman of the Finance Committee, reported that the Finance Committee had been requested to address two aspects of the Import Policy. They are the amount of the access charge and the mechanism for collection of that charge. As proposed by the

Finance Committee, Captain Briner made a motion that an access fee in the amount of $220/cu. ft. be accepted by the Commission. The motion was seconded by Commissioner Shropshire and the vote was unanimously in favor of the motion.

Captain Briner then proposed that Section V. of the Draft Import Policy be approved with the changes as adopted in the Finance Committee meeting (copy attached). The motion was seconded and approved unanimously.

Planning Committee

Chairman Jim Setser gave the background for the development of the Import Policy. At the July 15-16 meeting of the Planning Committee it was decided that an Import Policy Group needed to be established to develop an Import Policy. The group was appointed July 30, 1992, and is made up of the three members of the Planning Committee, Jim Setser, Mike Mobley, Carl Roberts, and Richard Hunter. The group collected information from August 1-12 to be used for pre-draft materials. At the Planning Committee meeting on August 13, 1992, a framework resolution was recommended and passed on August 14 by the Southeast Compact Commission. The public was then made aware of the passage of this resolution and requested to submit their response to this resolution. The Import Policy Group met again on August 31, 1992 to receive more information from generators and the public. The Group also met with attorneys to discuss the legal aspects of this Policy. The Group met this morning to further consider the Policy.

[Page Three]

Commissioner Setser stated that the following criteria were used in development of the Policy:

Does it promote public health and safety?
Is it of benefit to the Southeast Compact?
Is it non-discrimatory?
Is it legally defensible?
Is it reasonable?
Is it fair?
Is it the right thing to do?

Two major areas arose for discussion. One is the extent to which the Southeast Compact will provide incentives for progress in the national compacting process. The other area is the requirement that access be contingent on a contract between the Southeast Compact and the Region/State. **Commissioner Setser then recommended that the Commission adopt the Import Policy which includes a contract and that authority be given to the Executive Director to execute the contracts, not inclusive of negotiations.**

After much discussion, Chairman Hodes asked for a second to the motion which was given by Ben Smith.

Tayloe Murphy, Virginia Commissioner, expressed concerns between provisions in Section III. Access Policy and the provision in the contract that allows the Commission to terminate an access agreement for any reason. He indicated that it was unclear who would determine whether or not the other region or unaligned state has actively pursued the spirit of the LLRWPA.

Commissioner Murphy moved that the following wording be added to paragraph three of Section III.

> **. . . The Southeast Compact Commission shall make the determination whether or not a region or unaligned state has actively pursued the spirit of the Low-Level Radioactive Policy Act and such determination shall be final and binding on all parties and not subject to contest by the region or unaligned state or other persons.**

The motion was seconded by Bernard Caton. The motion was defeated with only two affirmative votes.

Commissioner Murphy made a motion that in paragraph 12 of the contract that the phrase "the jurisdiction over its or his person of all" be changed to "venue in the". Seconded and approved unanimously.

Commissioner Roberts made a motion to add language on page 6, Section III., of the Import Policy to read as follows:

[Page Four]

> **A report shall be submitted by each region and unaffiliated state that contracts for access with the Southeast Compact within thirty days of execution of the contract and shall include the following items at a minimum:**
>
> **a. Legislation enacted to enable siting activity;**
>
> **b. Entities responsible for siting activities;**
>
> **c. Resources committed to site development;**
>
> **d. Progress made since 1985 in siting a disposal facility or negotiating for access after June 30, 1994;**
>
> **e. A copy of the current siting plan for the state/region.**

The motion was seconded and approved unanimously.

Commissioner Roberts made a motion that the contract be amended in item #3 to include the following:

> **Within thirty days of the execution of this contract, the _____ Region (State) shall submit the following information at a minimum:**
>
> **a. Legislation enacted to enable siting activity;**
>
> **b. Entities responsible for siting activities;**
>
> **c. Resources committed to site development;**
>
> **d. Progress made since 1985 in siting a disposal facility or negotiating for access after June 30, 1994;**
>
> **e. A copy of the current siting plan for the state/region.**

The motion was seconded and adopted.

Commissioner Setser brought up an issue previously discussed but not decided upon related to signing of the contract. **Mr. Setser made a motion that the wording in Section IV., Part B, second sentence, read as follows:**

> **After the Commission authorizes a contract for access with an applicant state or compact, the Executive Director will mail a contract to the applicant state/compact for signature. Upon receipt of the signed contract from the applicant state or contract, the Executive Director is authorized to sign the contract.**

The motion was seconded and approved with two negative votes from the South Carolina commissioners.

[Page Five]

Commissioner Mike Mobley made the following amendment to the motion approved above.

> **. . . . Upon receipt of the signed contract, the Executive Director is authorized to execute the contract on behalf of the Southeast Compact Commission, assuming that no changes have been made to the contract by the applicant state or compact. In those cases where the contract is required by the applicant state or compact to be signed first by the Southeast Compact Commission, the Executive Director and Chairman are so authorized. A contract for access will be effective as soon as it is signed by both parties and received by the Southeast Compact Commission.**

The motion was seconded and approved.

Dr. Hunter suggested that the Chairman be added as a signee in addition to the Executive Director.

Dr. Hunter's motion was seconded and approved.

Kathryn Visocki asked for direction in communicating that the contract is non-negotiable. It was suggested that this be explained to a cover letter.

A roll call vote was given on the Policy/Contract as amended. The vote was unanimous approving the Policy/Contract.

New Business

Dr. Hodes requested that the Commission consider that the Import Policy Group be formalized into the Import

Policy Committee with the same members and Jim Setser as Chairman of the Committee. **Captain Briner made the motion with a second by Ben Smith. This motion was approved unanimously.**

Mike Mobley requested that the committee who studied the Aerojet request for exemption from fees (Palmer, Hunter and Mobley) give a report on the Aerojet situation. Dr. Hunter gave background as to Aerojet's request for an exemption. He stated that Aerojet would possibly have to close their facility with a loss of 170 jobs as a result of the inequity caused by the S.C. law requiring fees from generators outside of South Carolina. He called on Mr. Brad Squibb of Aerojet to give a status report on the current situation.

Mr. Squibb reported that an extension had been granted on the bid proposal. One hundred percent (100%) of the contract will be awarded to one contractor. They have retained $59/cu.ft. in escrow and plan on paying that. Because of this, they have laid off 56 people * * *

* * *

APPENDIX E

COMMISSION MINUTES
November 13, 1992
Page Three

Finance Committee Report

Captain Briner presented the following motion:

> In order to assure the continued development of the second regional disposal facility for low-level radioactive waste ("LLRW") in North Carolina, the Southeast Compact Commission ("Commission") must take appropriate action to furnish additional funds for use by the North Carolina Low-Level Radioactive Waste Management Authority ("Authority"). These funds will go to support the licensing phase of site development in North Carolina. Development of the North Carolina facility will assure the availability of a disposal site for all Southeast generators.
>
> The Commission has established a policy for the importation of out-of-region waste, including the imposition of an import fee. However, the volume of out-of-region LLRW and the amount of revenue generated from out-of-region LLRW is uncertain. The North Carolina siting process must move forward independent of any policy related to, or revenue derived from the importation of out-of-region LLRW. Because the cash flow requirements of the Authority must be met in a timely manner during 1993-1995, fees will be assessed on all Southeast LLRW generators during that period.
>
> **The Finance Committee recommends that the Commission establish an access fee, to be levied on all Southeast LLRW generators at a rate**

sufficient to raise $3 million per quarter for a total of $36 million over the three year period, January 1, 1993 – December 31, 1995. Fee collection shall be in accordance with the attached "Mechanism to Collect Revenues During the Period January 1, 1993 – December 31, 1995 for Continued Development of the Second Regional Disposal Facility for the Southeast Compact Region."

The motion was seconded by Carl Roberts.

Mike Mobley requested that a subcommittee of the Finance Committee be established to look at the process and put into place standards for fee programs so that there is a set mechanism to deal with these fees.

Dr. Hodes said that this could be established as a staff function to put together a chart outlining the details of each of the fees.

Dr. Hodes called for a roll call vote which was unanimously in favor of the motion.

APPENDIX F

COMMISSION MINUTES
April 29, 1994
Page Six

information, because we have both John Mac Millan and Dayne Brown here, has been presented. I think the real important part is that we have obtained the assurances and, of course, you heard in the Finance Committee Meeting which we will have a report soon, that we have acted, we've got a tentative recommendation on their funding request."

Commissioner George Miller reported that Governor Hunt continues to support the process. The Joint Select Committee on Low-Level Radioactive Waste continues to meet on a regular basis. At the April 15 meeting, the committee reaffirmed the work of the Compact Commission by issuing a Statement of Policy. (Attached)

Report of the Planning Committee

Chairman Setser reported that the Planning Committee met and determined that the Proposed Budget for 94-95 was in line with the goals of the Five-Year Strategic Plan. This report was made to the Finance Committee.

Report of the Finance Committee

Chairman Briner presented the Budget for Fiscal Year 94-95 which was approved unanimously with no discussion. Capt. Briner then presented two requests from the North Carolina Authority for funding.

The first motion was approved unanimously:

The Commission grants the request from the North Carolina Authority for advancement of funds from the Regional Access Fee when necessary on a documentated basis not to exceed a total of $3 Million. The advance will be paid out of the accummulated [sic] funds of the Compact share of the Out-of-Region Access Fee and will be repaid to the Out-of-Region Access Fee fund from the Regional Access Fees collected in the future.

The second motion was approved unanimously:

The Commission shall approve the transfer of up to $7 million to North Carolina on an as-needed basis. The Chairman will appoint a group composed of the Chairman, the Treasurer, the Chairman of the Monitoring Group and any other Commissioners or Alternate Commissioners interested who will, by telephone and/or fax, evaluate the information provided to establish that the need for each payment has been documented. The written approval by a majority of the group will be required to authorize the actual expenditure of each requested payment.

APPENDIX G

[Names Omitted in Printing]

[LOGO] Southeast Compact Commission
for Low-Level Radioactive Waste Management

January 5, 1996

The Honorable James B. Hunt
Governor
State of North Carolina
116 West Jones Street
Raleigh, NC 27603-8001

Dear Governor Hunt:

Since 1983 we have been working together to provide a safe and economical low-level radioactive waste (LLRW) facility needed by southeast industries and institutions. I would like to apprise you of several developments which may affect how we fulfill our responsibilities to southeast waste generators and rate payers in the future. I am also corresponding with Lieutenant Governor Wicker, President Pro Tem Basnight, Speaker Brubaker, and Co-Chairmen Conder and Dickson of the Joint Select Committee on LLRW to relay the same information.

Allow me first to review for you the history of the Southeast Compact and the statutory responsibilities of its members. In 1983, the states of North Carolina, Alabama, Florida, Georgia, Mississippi, South Carolina, Tennessee, and Virginia entered into a cooperative agreement to form the Southeast Compact, which was ratified by Congress in 1985. The Compact allows the southeast states to exclude out-of-region wastes from disposal at in-region facilities. South Carolina was to serve as the Compact's

first host state with the Regional Facility at Barnwell slated to close at the end of 1992.

In 1986, the Compact selected North Carolina as the second host state. The designation of North Carolina as the second host state obligates North Carolina to develop a facility for disposal of the Region's low-level radioactive waste for a period of twenty years. The Compact Law required that this facility be developed in no event later than 1991 and gave the host state the responsibility for financing, siting, and licensing the facility. North Carolina put a siting process in place and in late 1992 the North Carolina Authority submitted a license application for the Wake County site. The license application has been under review for three years by the North Carolina Division of Radiation Protection and there are no indications when the review will be complete.

A total of more than $85 million has now been expended on site development in North Carolina. Over the past five years, the Southeast Compact Commission has provided [page 2] $55 M toward those efforts. North Carolina is now five years beyond the 1991 statutory deadline for opening a regional disposal facility. Recently the Commission has received conflicting reports from state agencies in North Carolina regarding the likelihood of licensing the Wake site and the resources required to do so. We understand that the North Carolina Authority plans to decide in late January whether to proceed with efforts to obtain a license for the Wake County site.

The State of South Carolina withdrew from the Compact in July 1995. At that time, the Commission lost its traditional source of revenues from operation of the regional

facility in Barnwell. The loss of these revenues severely diminishes the Commission's ability to assist North Carolina in meeting its responsibilities for funding and developing a LLRW disposal site.

In response to the concerns over project uncertainties, escalating costs and dwindling resources, the Commission took several actions in recent months to conserve resources while it evaluates the existing situation.

In August 1995 the Commission passed a resolution expressing its sense that further funding to the project would be contingent upon the contractor's (Chem-Nuclear Systems) financial investment in the project. The resolution was transmitted to the North Carolina Authority that same month. At a subsequent meeting in November 1995, the Commission reaffirmed its position in a resolution which prohibited consideration of the release of any further funds until a response from the contractor is received and until a comprehensive site assessment report is provided by the North Carolina Low-Level Radioactive Waste Management Authority which includes the scope, cost and length of time required to pursue a licensing decision.

The Commission also adopted new requirements for the release of funds. In the future, contractual agreements must be established for funding releases. In addition, the expenditure of funds for site development must be conditioned upon the achievement of siting goals. Also passed was a requirement that North Carolina develop a business plan for site development, which includes the projected costs and timetable for developing a regional facility in North Carolina.

The development of a Regional Disposal Facility in North Carolina is critical to the success of the Southeast Compact. After the North Carolina facility becomes operational, the Compact Law prohibits member states from withdrawing from the Compact. This secures the Compact's membership and the member states' future obligations to host regional facilities for the Compact. In addition, the opening of a new regional facility ensures a source of revenues for future Compact operations and a potential source of revenues for site development in the third host state. If the [page 3] Commission depletes its reserve funds and site development is not yet complete in North Carolina, the Compact's future livelihood will be jeopardized.

Many of the recent actions taken by the Commission are a direct result of increasing constituent concerns about the direction of the North Carolina project. At recent forums for southeast waste generators and other citizens, concern was expressed over increasing costs and delays, the open-endedness of the siting process, the lack of overall accountability for the project, and how North Carolina will fulfill its responsibilities when the Commission is no longer able to fund the process. In addition, we are told that if costs continue to escalate, prohibitive disposal rates may lead many generators to store at their individual sites rather than pursue safer centralized disposal.

The Southeast Compact has entrusted North Carolina with the task of providing a facility for safe and economical disposal for our industries, utilities, academic and medical institutions and ratepayers. To this end, the Commission has provided $55 M in financial support to North Carolina. Future Commission resources, however, will be

far more limited and will be subject to competing needs. In addition, any funds released will be based upon contractual agreements and other requirements. At some point, Commission funds will no longer be available to North Carolina for site development, and North Carolina will need to make alternate plans for fulfilling its obligations to the Compact. Please be advised that it will be necessary to begin considering the alternatives available to you for meeting these obligations.

I would like to express the Commission's continuing support for the site development efforts in North Carolina. If there is anything further the Commission can do to assist you in your efforts, please contact me.

Sincerely,

/s/ Richard S. Hodes
Richard S. Hodes, M.D.
Chairman

cc: George Miller
William H. Briner

APPENDIX H

[Names Omitted in Printing]

[LOGO] Southeast Compact Commission
for Low-Level Radioactive Waste Management

April 25, 1996

The Honorable James B. Hunt
Governor
State of North Carolina
116 West Jones Street
Raleigh, NC 27603-8001

Dear Governor Hunt:

Thank you for your letter of April 8, 1996 in which you assure me that North Carolina remains committed to fulfilling its obligations under the Southeast Compact. I would like to ensure that there is no misunderstanding as to the nature of those obligations.

Both your letter and statements made by Mr. Steve Levitas while chairing the April 18 meeting of the Inter-Agency Committee suggest that you expect the Compact Commission to take an active role in site selection decisions in North Carolina or make a decision which would relieve North Carolina of its host state obligations. You state in your letter that if "the future of the project is in jeopardy . . . then I suggest the Compact Commission move immediately to determine how best to address this problem." Mr. Levitas asked, "At what juncture will the Authority and the Commission make a decision about whether this project will go forward?" In my view, both of these statements misrepresent the role of the Commission as defined by North Carolina statute.

It is the Compact Commission's mandated role to select a host state and ensure that the selected state develops a facility. North Carolina statute makes it clear that the Commission should not dictate to the host state any specifics of the siting process such as location or technology. The Commission selected North Carolina as the host state and has monitored progress in North Carolina, being extremely careful not to dictate to the host state how to do its job. It is the responsibility of the host state to site, license, build and operate the facility, and that responsibility includes providing the necessary funding. While the Commission has provided funding voluntarily, it is under no statutory obligation to do so.

As I pointed out in my letter of January 5, North Carolina must consider the possibility that the remaining funds available from the Southeast Compact Commission may not be sufficient to complete the project and must plan accordingly to secure funds to complete the project and fulfill the State's obligation to the region. You state in your letter that you would not recommend to the General Assembly that it "assume a greater portion (of) the financial responsibility for the project than it has done to date."

[page 2] However, by enacting the compact into law the General Assembly already assumed responsibility to fund the project to completion. To suggest that the General Assembly not provide further funding is to suggest that the State disregard its agreement with six other states.

North Carolina entered the Southeast Compact voluntarily, knowing that it would be required to take its turn as a host state. As a part of the host state selection process and before North Carolina was selected as host state, all states were formally given a period of time in

which to demonstrate to the Commission that no land suitable for a disposal site was available in the state. No state made such a demonstration.

I would like your help understanding two issues raised by your letter. You stated that North Carolina remains committed to fulfilling its obligations, yet go on to say that North Carolina will not fund the work, and this lack of funding will place the project in jeopardy, a problem you suggest the Commission would have to address. I would be most interested in knowing how you reconcile this apparent contradiction.

If I am interpreting your statements correctly and you do expect the Compact Commission to take an active role in site selection decisions in North Carolina and/or make a decision which would relieve North Carolina of its host state obligations, the Commission would be interested in learning which specific section of the statute authorizes it to take such actions. If this is not your intended meaning, we would appreciate a clarification of your statements.

We look forward to receiving your reply.

Sincerely,

/s/ Richard S. Hodes
Richard S. Hodes, M.D.
Chairman

cc: Southeast Compact Commission
Rep. George W. Miller, Jr.
Capt. William H. Briner
Rep. Dub Dickson
Sen. Richard Conder
Warren Corgan
John MacMillan
Steve Levitas
Dayne Brown

APPENDIX I

[Names Omitted In Printing]

[LOGO] Southeast Compact Commission
for Low-Level Radioactive Waste Management

May 10, 1996

The Honorable James B. Hunt Jr.
Governor
State of North Carolina
116 West Jones Street
Raleigh, NC 27603-8001

Dear Governor Hunt:

The Southeast Compact Commission will meet in June to consider continued funding for development of the regional low-level radioactive waste disposal facility in North Carolina. Commissioners have raised a number of different mechanisms for continued funding of the facility. At least one of those options would involve payment of funds to North Carolina after specific actions were completed. Such a mechanism would necessitate immediate action by the North Carolina General Assembly to appropriate funds to enable the project to move forward without interruption or delay.

While the Commission has provided funding voluntarily, it is under no statutory obligation to do so. It is the Compact Commission's mandated role to select a host state and ensure that the selected state develops a facility. By statute, the Commission is not responsible for any of the costs associated with the development or operation of the facility. It is the responsibility of the host state to site, license, build and operate the facility, and that responsibility includes providing the necessary funding.

Furthermore, there is the possibility that the remaining funds available from the Commission may not be sufficient to complete the project. If that is the case, the General Assembly would also need to act to provide funds to complete the project in order to fulfill the State's obligation to the region.

If you wish to discuss this information further, members of the Commission or its staff are available to meet with you.

Sincerely,

/s/ Richard S. Hodes
Richard S. Hodes, M.D.
Chairman

Identical originals sent to: Sen. Marc Basnight
Rep. Harold Brubaker
Sen. J. Richard Conder
Rep. Walter Dickson

cc: Southeast Compact Commissioners
Steve Levitas
John Mac Millan

APPENDIX J

[SEAL]

STATE OF NORTH CAROLINA
OFFICE OF THE GOVERNOR
RALEIGH 27603-8001

JAMES B. HUNT JR.
GOVERNOR

June 14, 1996

Richard S. Hodes, M.D., Chairman
Southeast Compact Commission
For Low-Level Radioactive Waste Management
21 Glenwood Avenue, Suite 207
Raleigh, North Carolina 27603

Dear Dr. Hodes:

I am writing in response to your letters of April 25 and May 10, 1996. In those letters you state that it is North Carolina's responsibility, as the next host state selected by the Southeast Compact Commission, to site, license, build, and operate a regional low-level radioactive waste (LLRW) facility *and* to provide the necessary funding for that purpose.

Your assertion that North Carolina law somehow obligates the State of North Carolina to fund a regional LLRW facility is incorrect. North Carolina law states explicitly that all costs associated with this project should be borne by the waste generators who would be served by a regional facility. N.C. GEN. STAT. § 104G-15(a). To date, the Compact Commission has provided a means to carry out that State law, which I continue to believe is sound policy. Further, one overarching policy goal of the

Compact, also codified as North Carolina law, is to "distribute the costs, benefits and obligations of successful low-level radioactive waste management equitably among the party states." N.C. GEN. STAT. § 104F-1 [COMPACT ART. I].

Although the Compact itself in no way obligates this or any other state to pay for a regional facility, as you note, the Commission has recently suggested that *future* funding might be premised on some sort of contractual commitment by North Carolina. This position recognizes that there is no existing enforceable obligation, under the Compact or otherwise, between this State and the Commission or other party states. In fact, the various noninterference and termination provisions of the Compact, to which you allude in your letter of April 25, clearly remove any funding or other enforceable obligations as a legal matter.

The Compact Commission has appropriately provided more than $70 million in project funding to date. In doing so, the Commission no doubt recognized that such funding was essential to the project, which I believe would be the case if any other Compact member were the next host state. North Carolina shares an interest with the Commission and the other party states [page 2] in seeing that a regional LLRW facility is licensed, that it is safe, and that it is funded by waste generators in an equitable manner. North Carolina has provided almost $30 million in support of the project and continues to fund the Authority and regulatory agencies at approximately $2 million per year. However, as stated in my April 8 letter, North Carolina is not prepared to assume a greater portion of the project costs. If the Commission is not willing

or able to continue funding the North Carolina licensing effort, it simply will not be able to proceed.

My warmest personal regards.

Sincerely,

/s/ James B. Hunt
James B. Hunt Jr.

cc: Hon. George W. Miller
Capt. William Briner
Warren Corgan
John MacMillan
Steve Levitas
Dayne Brown

APPENDIX K

[SEAL]

STATE OF NORTH CAROLINA
OFFICE OF THE GOVERNOR
RALEIGH 27603-8001

JAMES B. HUNT JR.
GOVERNOR

July 18, 1996

Richard S. Hodes, M.D.
Chairman
Southeast Compact Commission
21 Glenwood Avenue, Suite 207
Raleigh, NC 27603

Dear Dr. Hodes:

In response to your letter of July 18, 1996, I would like to state that my office has repeatedly responded to your communications.

I want to re-affirm that North Carolina is ready to go forward with a licensing work plan agreed to by all parties and we have restated our position that funding must come from or through the Southeast Compact Commission.

North Carolina Commissioner Miller at the June 18, 1996, meeting requested $4 million necessary to go forward with the first phase of the work. I am advised that Mr. MacMillan, Executive Director of the Authority, made clear what would occur if the funding request was denied.

The Commission turned this down. If the project is delayed, it will be the result of the Commission turning down the funding request.

We have been represented on the Commission by Representative George Miller and Captain William Briner. They attend all meetings and are readily available to receive any messages from the Commission.

Sincerely,

/s/ James B. Hunt
James B. Hunt, Jr.

APPENDIX L

[Names Omitted In Printing]

[LOGO] Southeast Compact Commission
for Low-Level Radioactive Waste Management

July 9, 1996 HAND DELIVERED

The Honorable James B. Hunt
Governor
State of North Carolina
116 West Jones Street
Raleigh, NC 27603-8001

Dear Governor Hunt:

Thank you for your letter of July 3, 1996, in which you expressed interest in resolving the remaining issues between the Commission and the State of North Carolina so that we can go forward with the work of establishing a low-level waste disposal facility.

We acknowledge your recognition of State Representative George W. Miller and Captain William H. Briner as representatives of North Carolina on the Southeast Compact Commission. As charter members of the Commission, they have worked closely with us for thirteen years, are knowledgeable of the issues and valued participants in the Commission's deliberations. For this reason, and because of procedural issues and possible constitutional issues of incompatibility of office, it was the intent of our June 18 resolution that you appoint a separate individual or agency to negotiate on behalf of the State with the Commission as a whole.

We are concerned that the value of participation by Commissioners Miller and Briner as Commissioners will be

lost if they are placed in the position of negotiating with a Commission on which they serve. At some point, Commissioners will need to evaluate the work of the negotiators. This may create an uncomfortable situation for Commissioners Briner and Miller if they must judge their own work, and possibly a procedural problem in voting. In effect this would take away from the Commission the contributions of two valuable Commissioners.

We need the knowledge and expertise of Captain Briner and Representative Miller as members of the Commission and do not wish to sacrifice the benefit of their participation. Rather, we respectfully request that you appoint another individual or agency to negotiate with the Commission on behalf of the State of North Carolina.

The Commission recognizes the urgent need to provide funding to preserve the project team and we stand ready to make available up to one million dollars in interim funding to the North Carolina Low-Level Radioactive Waste Management Authority as soon as we receive notice of your appointment. Like you, we are eager to resolve the remaining issues so that we may move forward.

We look forward to your reply.

Sincerely,

/s/ Richard S. Hodes
Richard S. Hodes, M.D.
Chairman

cc: Commissioners and Alternate Commissioners
Warren Corgan
John Mac Millan
Steve Levitas

APPENDIX M

[Names Omitted In Printing]

[LOGO] Southeast Compact Commission
for Low-Level Radioactive Waste Management

July 18, 1996 DELIVERED BY COURIER

The Honorable James B. Hunt
Governor
State of North Carolina
116 West Jones Street
Raleigh, NC 27603-8001

Dear Governor Hunt:

The Commission is disappointed and dismayed by your lack of response to our correspondence to you dated July 8, 1996. Having heard no official response, the Commission could not make the necessary funds available to the North Carolina Low-Level Radioactive Waste Management Authority. North Carolina's inaction has placed the entire project in jeopardy.

Certainly you are aware that, as a consequence of the State's lack of response, the project has already begun to shut down. Our Executive Director and I have had recent conversations with your Chief of Staff, and I am told you have received a briefing from the Authority's Chairman and a letter from the Authority's Director describing the initiation of activities to suspend project operations and close the project site. Indeed, today is the last day of operations for the Raleigh office of the project applicant, Chem-Nuclear Systems, Inc.

If the project to develop a low-level radioactive waste disposal facility for the Southeast region is compromised by this inaction, it is clearly not the responsibility of the Southeast Compact Commission.

I have communicated to your Chief of Staff and your Scheduler that I am prepared to travel to North Carolina to meet with you personally to discuss how to keep the project moving forward. I can assure you that the Commission remains committed to its previously communicated position to provide resources to the State for this purpose. I urge you to make the time available in the coming week for such a meeting.

Sincerely,

/s/ Richard S. Hodes
Richard S. Hodes, M.D.
Chairman

cc: Commissioners and Alternate Commissioners
Warren Corgan
John Mac Millan
Steve Levitas

APPENDIX N

MINUTES OCTOBER 3, 1996

[page 2] * * * dramatic improvement in the working relationship between the Authority and the regulators. He expressed a need to recognize disposal opportunities throughout the nation and a need to pursue co-funding by the contractor and North Carolina. Mr. Pugh expressed concern that the motions pending action by the Commission today do not address the issue of co-funding by North Carolina. He stated that there was no urgency in giving additional funding to North Carolina without having the capability of completing the process.

Mrs. Mary MacDowell, Chatham County Preferred Site Local Advisory Committee, reminded the Commission that the two scientific endorsers of the Licensing Work Plan stand to gain financially if funds are provided by the Southeast Compact Commission. The geologists representing Wake County and Chatham County do not believe the site meets the requirements for licensure. Mrs. MacDowell informed the Commission that nine candidates for the North Carolina General Assembly had held a press conference indicating their desire to stop the process and withdraw from the Compact.

Mr. Ken McCracken, an employee of Southern Nuclear Operating Company and chairman of the Southeast Utilities Generators Group (SEGG), stated that the recommendations presented by the SEGG at the last Commission meeting still stand. He stated that despite changes in waste disposal, utilities have a need for disposal of decommissioned waste. He stated that the SEGG

wants to move forward and expressed the need for continuity and affirmative action today with regard to funding.

Unfinished Business

Chairman Hodes recognized Commissioner Setser to speak to his amendment to the substitute motion. Mr. Setser acknowledged that he found his amendment did not contain some elements he desired and, instead, offered an amendment to Peter Schmidt's motion to strike the existing language and substitute the following language:

> **The Commission authorizes the release of funds to the North Carolina Low-Level Waste Management Authority ("Authority") on a quarterly basis to cover amounts expended by the Authority in performing the work described in the Licensing Work Plan (LWP), dated May 31, 1996. Release of the funds necessary to reach decision point number 2 is subject to compliance with and ongoing adherence to the following terms and conditions as certified by the Monitoring Committee of the Commission:**
>
> **CONDITION No. 1 – The establishment of a clear commitment by the Authority to maintain cost and schedule performance, consistent with the proposed Licensing Work Plan, unless fully justified by essential technical revisions to the LWP or other exceptional circumstances as concurred with by the Monitoring Committee of the Commission.**

CONDITION No. 2 – The establishment of a clear commitment by the North Carolina Interagency Review Committee that the Division of Radiation Protection (DRP) and other state agencies will devote resources as necessary to support state performance consistent with the LWP schedule, including the resolution of state restrictions on and selection of appropriate tracers for proposed field activities.

[page 3] **CONDITION No. 3 – Agreement by the Authority to develop and maintain an expanded level of detail in the LWP project schedule at least one quarter in advance of the schedule.**

CONDITION No. 4 – Approval by the Monitoring Committee of the Commission of, and commitment from the Authority to adhere to, reasonable LWP periodic reporting requirements which include, but are not limited to, actual quarterly expenditures as measured against the original LWP; an explanation of all schedule slippage or cost overruns; quarterly cost projections and an update of the LWP schedule; the timely reporting of the results of topical meetings and decision point meetings; and, prompt notification to the Commission by the Authority upon discovery by the Authority, its contractors or sub-contractors of any condition that may disqualify the site for its intended use. The continuation of funding will be contingent an the absence of conditions disqualifying the Wake County site for its intended use.

CONDITION No. 5 – Establishment of a process by the Authority and/or the North Carolina Interagency Review Committee, as

concurred in by the Commission's ~~Policy and Planning~~ Monitoring Committee*, that ensures continued DRP and Authority Senior Management level involvement in monitoring and maintaining consensus endorsement of the overall LWP and the prompt disclosure to the Commission of any new DRP concerns regarding the LWP.

FURTHERMORE, Commission Officers and Staff are hereby directed to work cooperatively with the Authority to establish updated site capacity requirements and waste stream characterization so that the Authority will characterize the site and seek a license in accordance with established Compact capacity requirements for the probable period of North Carolina site operation. This task is to be completed as soon as possible, but in any event, no later than the completion of Decision Point No. 2 in the LWP.

AND FURTHERMORE, the Commission recognizes that there are inadequate unreserved funds currently in the Commission's Treasury to meet projected needs to obtain a license for the existing site, for any potential litigation costs, and for costs related to construction of the facility. Therefore, the Commission directs the Commission Policy and Planning Committee, Commission Officers, and staff to work with the Authority, generators, and other parties to develop realistic models of cost and schedules for placing a site into operation and to develop realistic strategic approaches and agreements for the necessary funding. All work associated with this task shall be successfully accomplished by the completion of

Decision Point No. 2 of the LWP. Release of funds from the Commission to the Authority for work beyond Decision Point No. 2 in the LWP shall be in accordance with the above specified agreements for funding.

[page 4] *See approved change on page 5.

The motion was seconded.

Commissioner Michael Mobley queried John Mac Millan as to the amount of money needed to reactivate the team to work on the Licensing Work Plan. Mr. Mac Millan stated that an additional $500,000 would be necessary and a clear commitment from the Commission would be needed for future funding for the contractors to begin work.

Commissioner Hawkins asked Mr. Mac Millan if the $500,000 would cover expenses needed to address the five conditions laid out in Commissioner Setser's amendment to the motion. Mr. Mac Millan answered that it would.

A vote was taken on Mr. Setser's amendment to Peter Schmidt's main motion. The amendment passed.

A vote was then taken on Mr. Setser's amendment to the substitute motion offered by Commissioner Mobley at the 8/26/96 Commission meeting. The vote was defeated.

Commissioner Mobley then withdrew his substitute motion in favor of the amended main motion. The substitute motion was withdrawn by unanimous consent.

Commissioner Hawkins made a motion to amend the main motion by the addition of Condition 6 which would read:

> **The Commission shall not dispense any monies for further development without approval from the North Carolina legislature.**

After discussions relative to the effect of Commissioner Hawkins' amendment, the motion was defeated in a roll call vote of 10 to 4.

Commissioner Miller made the following amendment as a new paragraph to the main motion:

> **In the meantime, the Compact Commission should conduct an in-depth examination of the present and anticipated need for a second low-level disposal site in the Southeast. This feasibility study would include an analysis of volume of waste from the seven Southeast states, technology changes and developments that have occurred to date and anticipated availability of other disposal options. Also to be considered would be siting cost, availability of generator funds for the licensing process, site construction, maintenance, closure and perpetual care.**

The amendment was seconded. After a brief recess of the Commission, a vote was taken and the amendment was defeated.

The amended main motion as offered by Commissioner Setser was then voted on and passed in a roll call vote of 12 to 2.

[page 5] New Business

Commissioner Michael Mobley made the following motion:

> **In order to implement the previous motion, the Commission instructs staff to:**
>
> **(1) notify the N.C. Low-Level Radioactive Waste Management Authority that funds in an amount up to $500,000 will be made available for the Authority to provide an expanded level of detail in the Licensing Work Plan (LWP) and to re-deploy a project team for implementation of the LWP, such funds to be paid out upon receipt of documentation of actual expenditures;**
>
> **(2) organize a Special Meeting of the Monitoring Committee, to be held no later than October 20, 1996, for the purpose of developing a process to certify whether the five conditions in the previous motion have been met by the appropriate entities in North Carolina; and**
>
> **(3) organize a meeting of the Policy and Planning Committee, representatives of the Authority, Southeast waste generators and other appropriate parties to begin development of approaches and agreements for funding the LWP, litigation and construction in North Carolina.**
>
> **The motion by Commissioner Mobley was seconded.**

Commissioner Miller queried whether the funds would be disbursed on a reimbursement basis or advanced before work was done. Mr. Mac Millan explained that

contractors submit invoices for work previously authorized and then the Authority submits invoice documentation to the Commission Staff for reimbursement. Mr. Mobley stated that the intent of the motion was to reimburse for work done.

Executive Director Kathryn Haynes then questioned the reference to the Policy and Planning Committee in Condition 5 in Mr. Setser's motion. She inquired as to whether Mr. Setser instead wanted the Monitoring Committee to be referenced.

Commissioner Hawkins then made a motion that the vote on Mr. Mobley's motion be postponed until Mr. Setser's motion be reconsidered. The motion was seconded and passed.

Commissioner Setser made a motion to reconsider his amendment to the main motion previously passed. The motion was seconded and passed.

Commissioner Setser then moved that in Condition No. 5 of the main motion, the reference to the Policy and Planning Committee be replaced by Monitoring Committee and the Commission accept the roll call vote on the motion as previously taken. The motion was seconded and passed

A vote was then taken on the motion by Commissioner Mobley and it passed.

APPENDIX O

MINUTES April 18, 1997

[page 4] * * * **The Commission recognizes that there are insufficient funds currently in the Commission's treasury to meet projected needs to complete development of a low-level radioactive waste disposal facility in North Carolina through the construction phase. The Commission further recognizes that a Task Force for Facility Funding has been diligently working to develop an approach for obtaining the necessary funding but has not yet reached a conclusion. Therefore, we direct the Policy and Planning Committee, Commissioner officers and staff to continue to support the work of the Task Force for Facility Funding until a recommendation for funding is reached or the Task Force concludes that it cannot reach agreement on a recommendation.**

The Commission requests that the Task Force for Facility Funding continue its work as expeditiously as possible and that it notify the Chairman immediately upon reaching a recommendation so that a meeting of the Commission can be called at his recommendation. In the event that an agreement on a recommendation cannot be reached, the Policy and Planning Committee shall make a recommendation to the Commission as to how to proceed. The motion passed.

Mr. Mobley commended all the members of the Task Force for their hard work and dedication.

Report of the Administrative Committee

Peter Schmidt presented the Operating Budget for FY 1997-98 and made a motion that it be adopted as presented. The motion passed.

Report of the Monitoring Committee

Ms. Debra Shults reported that the Monitoring Committee adopted a resolution affirming compliance on Decision Point 2. She made the following motion:

The Monitoring Committee recommends to the Commission that the funds for the 3rd quarter, 1997, be released to the N.C. Authority after July 15 in the amount of $2.9 Million over the $6 Million previously authorized, pursuant to affirmative recommendations from the Authority on Decision Points 1 and 2 that in the reasonable judgment of the Authority it makes sense to proceed with the project, subject to review by the Monitoring Committee if indicated. The Staff will report the Authority's recommendations to the Chairman of the Monitoring Committee, who will, if necessary, call a meeting of the Monitoring Committee to veto the further release of funds. At all times in the funding release process the Chairman of the Monitoring Committee will be informed of fund releases and may call a meeting of the committee at any time.

Because of the large representation of the public at this meeting, Chairman Hodes asked for a motion for waiver of the rule to allow for public comment before Commission discussion of the motion.

Chairman Hodes explained the intent of the motion to be for the Commission to allocate funds in addition to the $6 M that has already been allocated. The purpose of the additional funds which is $2.9 M would be to allow the contractor to proceed with contracting procedures after the contractor and the Commission are satisfied that Decision Points 1 and 2 have been fully met and [page 5] agreed to. The Monitoring Committee would be authorized to refuse to release funds. If they do not, the staff will be authorized to release funds in accordance with statements presented for payment. Dr. Hunter will be the individual to be advised of all fund releases. He may call a meeting of the Monitoring Committee at any time. The Commission is delegating its authority to withhold funds to Dr. Hunter.

Commissioner Mobley made a motion to waive the rule to allow for 2-minute comments from the public on the motion.

Dr. Hunter made a substitute motion that two people representing the opposing view represented be allowed to talk for five minutes each. The motion was defeated.

Mr. Mobley's motion passed with a ⅘ roll call vote.

Public comment was received. (Comments are recorded on tape in Commission office.)

The Commissioners then debated the pending motion. Commissioner Miller expressed concern over the release of additional funds and the oversight of the release of funds by the Monitoring Committee.

Commissioner Hunter stated that he thought the Decision Points were to balance risk versus cost. They were

intended to be points at which the Commission would decide whether to go forward. He stated that he would like to forego concurrent work and just get to the Decision Point 2 even if it costs more.

Commissioner Mobley stated that the Commission has wrestled with many of the issues surrounding the funding of the Licensing Work Plan. He stated that disposal is the best route to protect the public from the hazards of radiation. Mr. Mobley feels that continued funding needs to be provided. Mr. Mobley then offered the following amendment to the motion with the motion to read as follows:

The Monitoring Committee recommends to the Commission that the funds for the 3rd quarter, 1997, be released to the N.C. Authority after July 15 in the amount of $2.9 Million over the $6 Million previously authorized. Monitoring of expenditures will be done by the Monitoring Committee pursuant to the October 3 motion of the Commission.

After further discussion, the motion was defeated.

Commissioner Schmidt then offered the following substitute motion:

The Monitoring Committee recommends to the Commission that the funds for the 3rd quarter, 1997, be released to the N.C. Authority after July 15 in the amount of $2.9 Million over the $6 Million previously authorized, pursuant to affirmative recommendations from the Authority on Decision Points 1 and 2 that in the reasonable judgment of the Authority it makes sense to proceed with the project, subject to review and

approval by the Monitoring Committee. The Staff will report the Authority's recommendations to the Chairman of the [page 6] Monitoring Committee who will call a meeting of the Monitoring Committee to review compliance with the conditions stated in the October 3, 1996 motion of the Commission and to approve the further release of funds. At all times in the funding release process, the Chairman of the Monitoring Committee will be informed of fund releases and may call a meeting of the committee at any time.

The substitute motion passed in a roll call vote.

New Business

There was no new business.

Public Comment

Several attendees provided comments. (Recording on tape available in Commission office.)

The meeting was adjourned at 12:36 p.m.

Approved:

/s/ William H. Briner
Secretary-Treasurer

Attachments: Executive Director's Report
Treasurers Report

APPENDIX P

MINUTES

* * * regulator will assume the foundation of the LWP has eroded and will move back to a more traditional regulatory approach.

Commissioner Hunter asked Mr. Whisnant who the parties were that had concerns and if they considered it imprudent to continue with the project. Mr. Whisnant stated that Dr. Burt with the Division of Radiation Protection had expressed concern about the prudence of continuing with the project. Someone in the Attorney General's office had expressed concerns about the process and its implications and prudence. Another member on the IAC who is a representative of the Division of Radiation Protection also raised concerns about the prudence of proceeding with the Wake site.

Old Business

Report of the Task Force for Facility Funding

Commissioner Mike Mobley, chairman of the Task Force for Facility Funding, recognized those who had participated on the Task Force and expressed his appreciation for their work. He presented a written report from the Task Force (copies available in the Commission office).

Report of the Monitoring Committee

Commissioner Hunter, chairman of the Monitoring Committee, reported that the Monitoring Committee met on June 27, 1997 and accepted the decision by the North Carolina Authority that Decision Point #2 had been met. Dr. Hunter called the Commission's attention to the letter

received on July 21, 1997 from Mr. Richard Whisnant, chairman of the Interagency Committee on Low-Level Radioactive Waste, and expressed a personal dilemma of releasing further funding to North Carolina. It appears there is no consensus on the implementation of the Licensing Work Plan.

Mr. Hunter then made a motion that Condition #5 be deleted from the October 3, 1996 motion. The motion was seconded.

Debate on the motion and the Intent of Condition #5 followed. **Commissioner Mobley offered a substitute motion that Condition #5 read as follows:**

CONDITION No. 5 – Establishment of a process by the Authority and/or the North Carolina Interagency Review Committee, as concurred in by the Commission's Monitoring Committee, that ensures continued DRP and Authority Senior Management level involvement in monitoring and maintaining consensus support of the overall LWP and the prompt disclosure to the Commission of any new DRP concerns regarding the LWP.

The substitute motion was voted upon and passed.

Public Comment

Several attendees provided comments. (Recording on tape available in Commission office.)

Report of the Task Force for Facility Funding (cont.)

Commissioner Mobley, chairman of the Task Force, continued his report by submitting the following motion:

The Task Force for Facility Funding requests that the Commission formally adopt the Report of Task Force for Facility Funding. The Commission further directs the Executive Director to formally transmit the report to the North Carolina Authority with a request to implement recommendations #2, #4 and #5 of the report.

The motion passed unanimously.

New Business

Vice-Chairman Jim Setser made a motion that the Commission approve the Authority's request for additional funding for the months of August and September for a total of up to $1.4 million. Further funding beyond the $1.4 million being considered will be predicated upon Mr. Whisnant providing the Commission with a successful progress report.

The motion was seconded. After discussion, the motion passed in a roll call vote of 9-2.

The next meeting of the Commission will be held in Orange Beach, Alabama on August 20-21, 1997.

The meeting was adjourned at 12:54 p.m.

Approved:

/s/ William H. Briner
Capt. William H. Briner
Secretary-Treasurer

APPENDIX Q

MINUTES August 21, 1997

[page 4] * * * Mr. Mobley also reported that the Memorandum of Understanding as presented by the Southeast Generators' Group was an outgrowth of the recommendations for funding made by the Task Force for Facility Funding. Mr. Mobley highlighted the presentation as made by Mr. Ken McCracken at the Policy and Planning Committee meeting. After much discussion, Mr. Mobley made the following motions:

Motion #1

Be it resolved that the Southeast Compact Commission:

- **Agrees in principle with the Memorandum of Understanding (8/13/97 Draft) drafted by the Southeast Compact Electric Utilities Generators Group;**
- **Hereby authorizes the Chairman of the Commission to communicate the Southeast Compact Commission's support to Governor Hunt and the North Carolina Low-Level Radioactive Waste Management Authority (Authority) and to urge them to favorably consider the Memorandum of Understanding;**
- **Authorizes the use of funds currently being provided by the Commission to the Authority to include appropriate legal expenses and other costs that may be incurred in negotiating and developing a finalized Memorandum of Understanding; and**
- **Authorizes expenditure of current Southeast Compact Commission funds to support**

the negotiation and documentation of licensing loans and a construction funding letter of intent.

Public Comment

Public comment was entertained before vote on the motion offered by Mr. Mobley. Mr. Jim Warren, chairman of NC WARN, expressed his opinion that the site was still a gamble. He stated that the Memorandum of Understanding was burdensome for North Carolina. He feels that the utilities are dangling free money in an effort to trap North Carolina legally and financially. He also stated that he did not believe the Governor would approve of the MOU.

Ms. Mary MacDowell stated that the Win-Win-Win-Win statement expressed in the Memorandum of Understanding does not include Chatham County.

A vote was taken on Motion #1 and it passed 11-2 with both North Carolina Commissioners voting against it.

Motion #2

The Southeast Compact Commission requests that the North Carolina Low-Level Radioactive Waste Management Authority (Authority) consider the proposed Memorandum of Understanding as a mechanism to address the license funding shortfalls and construction funding. It is the belief of the Southeast Compact Commission that the proposed Memorandum of Understanding addresses the previously identified significant issues in a balanced effective manner.

Further, believing that time is of the essence, a response regarding the Authority's intent with regard to the proposal is requested by December 1, 1997. An expression of agreement in principle to the final [Page 5] Memorandum of Understanding or an alternative proposal with appropriate concurrences is the Southeast Compact Commission's expectation.

The vote on Motion #2 passed 11-2 with both North Carolina Commissioners voting against it.

Motion #3

The Southeast Compact Commission authorizes the expenditure of up to $10,000.00 from the Commission's budget funds to obtain legal opinions regarding the Memorandum of Understanding and specifically regarding the export restriction issue.

The motion passed unanimously.

Report of the Monitoring Committee

Richard Hunter, Chairman of the Monitoring Committee, stated that there may be a need for stop gap funding for October and November for the Authority and made the following motion:

The Monitoring Committee recommends that the Southeast Compact Commission provide interim additional stop gap funding to the North Carolina Low-Level Radioactive Waste Management Authority through November 30, 1997 up to $1.2 million.

The motion passed unanimously.

The meeting was adjourned at 1:55 p.m.

Approved:

/s/ William H Briner
Secretary-Treasurer

Attachments: Executive Director's Report
Treasurer's Report

APPENDIX R

[Names Omitted In Printing]

[LOGO] Southeast Compact Commission
for Low-Level Radioactive Waste Management

August 28, 1997 HAND DELIVERED

The Honorable James B. Hunt, Jr.
Governor
State of North Carolina
Office of the Governor
Raleigh, NC 27603-8001

Dear Governor Hunt:

In a series of letters to one another last year, we discussed the fact that sufficient Commission funds were not available to complete development of a low-level radioactive waste disposal site and that a plan was needed to secure the necessary funding. While there was not complete agreement on funding responsibilities, it was agreed that additional funding was needed.

Lacking resolution of the funding issue, the Commission organized a Task Force for Facility Funding to study the problem and recommend mechanisms for future funding. The Task Force was formed as an independent body with volunteer representatives of the North Carolina Low-Level Radioactive Waste Management Authority (Authority), the Commission, waste generators and the public. Enclosed are the recommendations of the Task Force issued in May and approved by the Commission in July.

Stemming from the recommendations of the Task Force, staff of the Authority and a group of regional waste generators began discussion of an approach in which regional generators could provide financial assistance to

North Carolina to complete site development and ensure long-term financial viability of the site. Enclosed is the latest draft Memorandum of Understanding (MOU) drafted by the Southeast Compact Electric Utilities Generators Group (SEGG).

Key elements of the proposal are as follows:

Participating generators will loan funds to the Authority to cover the anticipated shortfall for implementing the Licensing Work Plan (LWP), approximately $7 million, with provisions to cancel and forgive the debt if the Wake County site is not licensable due to a demonstrable site deficiency. If the site is licensable, the loans would be repaid when revenue bonds are issued to finance construction of the facility. The loan will not be indebtedness of the State or any of its political subdivisions and will require the Governor's approval after receiving the advice of the Advisory Budget Commission.

To facilitate issuance of revenue bonds, participating generators will guarantee that funding will be provided to North Carolina annually for any shortfall of facility operating revenues to meet the annual revenues necessary for operation of the facility, retirement of its debts and funding of its long-term care and closure funds.

To ensure that closure and long-term care funds are available in the event of an unanticipated and unavoidable premature closure of the facility, participating generators will agree to pay North Carolina their share (based on disposed volume) of any closure and long-term care fund shortfalls.

Reasonable conditions, including participation by both Duke Energy and Carolina Power and Light, will have to exist prior to the participating generators assuming their obligations, [page 2] and certain conditions (such as excessive taxes or fees) will release them of those responsibilities. Voluntary participation in the MOU will be open to all Southeast Compact generators on equitable terms.

The MOU proposes that the Southeast Compact Commission make available the funds that it has designated for site licensing prior to generator loans being used for LWP funding. It also requires the Commission to implement an export policy which would allow access to out-of-region disposal facilities at all times for generators voluntarily participating in the MOU and, following annual disposal of a predefined amount of waste at the North Carolina Facility, for all other generators.

The MOU contemplates that the Authority would contractually commit to four items: (i) repayment of LWP loans plus interest equal to the generators' weighted average cost of capital from the funds raised when construction revenue bonds are issued following licensing of the facility; (ii) implementation of defined facility rate structures (which differentiate between generators participating in the MOU and generators not participating); (iii) implementation of defined escrow fund accumulation and distribution plans to ensure full funding of the closure and long-term care funds by the end of facility operation, payment of North Carolina capitalized expense plus interest upon completion of the State's term as host state, and payment of

construction bond principle and interest; and (iv) reasonable audit rights for Participating Generators.

The Commission is continuing to provide funds for site development to the Authority through November 30, 1997. However, as we have discussed, it will be imprudent to continue to deplete Commission resources for this purpose if a source of funds is not established soon for the ultimate completion of the project. If North Carolina does not have a long-term funding mechanism under consideration by December 1, we will not be able to continue funding.

The Commission heard a presentation of the draft MOU on August 20. On August 21, the Commission agreed in principle with the MOU and asked me to urge you and the Authority to consider the MOU as a mechanism to address the license funding shortfalls and construction funding. In order that we may proceed, please notify me by October 1, 1997 whether you agree in principle with the proposal offered by the SEGG.

The Commission is encouraged by the collaborative effort of the Authority, generators, the public and others and is hopeful an agreement can be reached to benefit all patties. I look forward to your response.

Sincerely,

/s/ Richard S. Hodes
Richard S. Hodes, M.D.
Chairman

cc: Commissioners and Alternate Commissioners
Warren Corgan
Walter Sturgeon

Richard Whisnant
Southeast Compact Electric Utilities Generators Group

Enclosures: Report of the Task Force for Facility Funding
Memorandum of Understanding
Overheads and Summary, SEGG Report to the Policy and Planning Committee

APPENDIX S

[SEAL]

STATE OF NORTH CAROLINA
OFFICE OF THE GOVERNOR
RALEIGH 27603-8001

JAMES B. HUNT JR.
GOVERNOR

November 3, 1997

Richard S. Hodes, M.D., Chairman
Southeast Compact Commission
for Low-Level Radioactive Waste Management
21 Glenwood Avenue, Suite 207
Raleigh, North Carolina 27603

Dear Dr. Hodes:

As I promised in my letter of September 16, 1997, I have given further attention to the Compact Commission's efforts to develop additional funding for the proposed low level radioactive waste disposal facility in North Carolina during the few weeks since my return from the trade mission to Europe and Asia. To reiterate my earlier correspondence, I appreciate the Commission's efforts to develop a funding solution. I understand that the Compact Commission still endorses a proposal made by a group of several southeastern utilities (not including North Carolina utilities) to loan up to seven million dollars to a North Carolina State agency in exchange for, among other things, preferential rates and the ability to export waste out of the compact region.

At the outset, it must be recognized that this proposal involves authority vested by statute in multiple State agencies (not all of which are in my cabinet), local units of government, and the North Carolina legislature. Since

the Compact Commission endorsed this proposal in August, it has been reviewed by several of these agencies in North Carolina that have direct involvement, including, among others, the staff of the Local Government Commission in the office of our State Treasurer (essential due to the proposed bond issue to pay for construction of the facility); the Interagency Committee on Low-Level Waste (essential as a forum for concerns relating to facility regulation and operation); the Low-Level Radioactive Waste Authority (an independent State agency who is called on to sign the agreement); the Department of Environment and Natural Resources (responsible for licensing and regulating the facility) and the Attorney General's office. My staff has discussed the matter with representatives of each of these agencies, because the proposal calls for matters (such as issuing bonds, limiting the State's ability to assess taxes, and limiting the way a facility is operated) that are outside the jurisdiction of the Governor's office.

Based on my initial review, I find it doubtful that the practical, as well as legal, commitments envisioned would be approved by all the affected agencies and governmental [page 2] bodies. I do not believe they or I can square the Compact Commission's statutory goal of "distribut[ing] the costs, benefits and obligations of successful low-level radioactive waste management equitably among the party states," Compact Art. I, with a proposal that, among other things, requires:

- a North Carolina State agency to take on seven million dollars in debt with no budgeted or other means of repayment;

- North Carolina to bear the brunt of any shortfall in funding, given that this State has already paid over $30 million towards the facility, while every other Compact State has paid around $25,000; and

- North Carolina to limit the pricing and revenue stream from this future facility, at great risk to its ability to support bond financing, without the matter even being reviewed by the North Carolina legislature.

Furthermore, they will wonder, as I do, why the Compact Commission and generators have insisted that North Carolina commit to these steps in a timeframe that comes just before the entire schedule and budget for the facility is to be reevaluated. This timeframe is even less appropriate given the events that have recently come to light in the region and the nation that suggest the emergence of a fundamentally different market for low level radioactive waste.

At the conclusion of Decision Point 1, I understand the contractor for the authority is to reevaluate the schedule and budget for this facility. At that point, if there does, indeed, appear to be a shortfall in projected licensing revenue, the simplest, most equitable approach would be for each party state that has not already contributed beyond its pro-rata share to make a pro-rata payment to cover the shortfall. I am sure that the Compact Commission can come up with some such approach that provides the relatively few dollars needed to complete licensing without jeopardizing the future operation and financing of the facility.

My warmest personal regards.

Sincerely,

/s/ James B. Hunt
James B. Hunt Jr.

JBH:rbw

cc: Hon. George W. Miller
Capt. William Briner
Warren Corgan
Walter Sturgeon
Robert High
Andrew A. Yanore, Jr.

APPENDIX T

[Names Omitted in Printing]

[LOGO] Southeast Compact Commission
for Low-Level Radioactive Waste Management

HAND DELIVERED

November 14, 1997

The Honorable James B. Hunt, Jr.
Governor
State of North Carolina
Office of the Governor
Raleigh, NC 27603-8001

Dear Governor Hunt:

Thank you for your letter of November 3, 1997 in which you state your thoughts, based upon your initial review, with regard to future funding of the proposed low-level radioactive waste facility. It is helpful to learn your thoughts at this stage in the process. There seem to be fundamental areas of misunderstanding leading to disagreement which need to be clarified and worked out.

You are correct in stating that the Commission continues to support the Memorandum of Understanding (MOU) as proposed. We believe it to be an equitable and thorough approach for providing the necessary funding mechanisms, providing necessary assurances, and balancing the risks among the parties involved. Under this proposal all parties would win – a facility would be opened to satisfy the needs of the compact and the generators, and the state would have a guaranteed revenue stream to recover its costs. The MOU acknowledges existing statutes and

jurisdictions and does not ask the State to contractually commit to actions (such as limiting the State's ability to assess taxes) contrary to those statutes. The agreement does not place absolute constraints on the State. It specifies certain conditions under which the participating generators would be released from their commitments but does not seek to contractually bind the State to preventing those conditions.

Based on the wording of your letter, you appear to have received interpretations of the MOU that are contrary to its intent in several key areas. For example, it is difficult for us to comprehend how a proposal with a guaranteed revenue stream can be seen as limiting " . . . the revenue stream from this future facility, at great risk to its ability to support bond financing." To the contrary, the proposal offers to reduce the financial risk to North Carolina and to enhance the State's ability to market revenue bonds for construction of the facility by guaranteeing an annual revenue stream sufficient for North Carolina to repay all bond debt, recover its investment, cover all facility operating costs, and fund reasonable fees. The guaranteed revenue stream is estimated to be $40 million per year for twenty years. We encourage you to study the proposal before drawing a final conclusion and will be pleased to discuss or negotiate the proposal or an alternative proposal.

Whether the response we receive from the North Carolina Low-Level Radioactive Waste Management Authority (Authority) embraces the MOU as proposed, a modification of the MOU, or an alternative plan such as the one you proposed in the letter, the response will need to encompass several elements not indicated in your letter.

First, the proposal must address funding for all future phases of site development. In addition to the funds needed for licensing, funding must be addressed for litigation and for construction. As North Carolina's representative on the Task Force for Facility Funding repeatedly pointed out, it will be difficult to obtain approval for revenue bonds for construction without a guaranteed revenue stream or customer disposal volume.

[page 2] Secondly, the proposal from the Authority must include evidence of concurrence from all parties to the proposal. If modifications to the MOU are proposed, then concurrence would be required from the Southeastern Compact Utility Generators Group (SEGG) and any other parties to the proposed agreement. If funding from other states is proposed, then agreement in principle from the other states will need to be presented. If the Commission will be expected to provide further funding for the project or otherwise be a party to the proposed funding plan, we need to be consulted in the negotiation of the proposal before it is presented by the Authority.

You have questioned the appropriateness of committing to a funding plan before the schedule and budget are once again reevaluated The Commission clearly has asked for no firm commitment at this time, but merely an agreement in principle to a *non-binding* MOU, intended to facilitate good faith development of a binding agreement before the existing Commission funds are exhausted. To delay agreement to a non-binding MOU in anticipation of a schedule and cost revision ignores the hard fact that Commission funds may be fully depleted in less than a year. Based on the fact that five months have already

elapsed since the concepts in the MOU were first proposed to representatives of the Authority, seeking to assure that a year is available for completing a funding agreement does not seem excessive. By the time signatures to a binding agreement are required (on or before June 30, 1998), reevaluation of the budget and schedule will certainly be complete.

Further, you questioned the time frame, "given the events . . . that suggest the emergence of a fundamentally different market for low level radioactive waste." We have no knowledge of recent events which have changed the market for commercial low-level radioactive waste.

As for your concern with squaring the Commission's statutory goal of distributing the costs, etc. among the party states, I will restate the Commission's position that it is the intent of the compact law to accomplish this goal by obligating each party state, in turn, to develop and operate a facility. It has always been the intent of the law that each host state would be repaid for its expenses from facility revenues.

As stated in earlier correspondence, if agreement in principle cannot be reached among all appropriate parties by the December 1, 1997 deadline, the Commission will not provide funding for work done beyond November 30, 1997. The Commission remains hopeful that we may reach a meaningful agreement for future funding with the Authority by that date.

Sincerely,

/s/ Richard S. Hodes
Richard S. Hodes, M.D.
Chairman

cc: Warren G. Corgan
Commissioners and Alternate Commissioners
Southeastern Compact Utility Generators Group

APPENDIX U

[SEAL]

North Carolina
Low-Level Radioactive Waste
Management Authority

[Names Omitted in Printing]

James B. Hunt, Jr., Governor
Walter B. Sturgeon, Jr.,
Executive Director

December 19, 1997

VIA FACSIMILE & FIRST CLASS MAIL

Richard S. Hodes, M.D., Chairman
Southeast Compact Commission for
Low-Level Radioactive Waste
21 Glenwood Avenue, Suite 207
Raleigh, North Carolina 27603

Dear Dr. Hodes:

I was disappointed to receive your letter of December 1 which responded to the Authority's November 25 motion and corresponding letter by stopping project funding. It is North Carolina's view that the Compact Commission and the other member states have failed to honor their commitments under the compact law and made further performance by the Authority impossible.

As you know, the Authority successfully completed Decision Points 1 and 2 of the Work Plan and technical activity was moving along at a very good pace. The Authority's priority has been to focus its resources and attention on obtaining an operating license, but it is committed to attempt to resolve construction funding and

other issues in the proposed Memorandum of Understanding. It is clear to us, however, that a mutually agreeable funding arrangement will take a lot of time and more flexibility to resolve. The financial consultant which we have retained has reinforced that view. We are committed to attempting to resolve unsettled issues, including future funding, given sufficient time. Insisting that we resolve these issues by 12/1/97 was unreasonable, as I told the Compact Commission at its November meeting.

All of our current relationships and responsibilities are between the Authority, the Compact Commission, and its member states. While the Compact Commission has asked the Authority to agree in principle with the MOU or find an alternative (both Governor Hunt and I have already proposed alternatives which were rejected), we would expect the Compact Commission to be working [page 2] hard to develop alternatives as well.

The inability of the generators' group to provide additional funds in the form of a grant rather than the proposed loan was also very disappointing to us. These monies would not have been needed until 1999, when the project would have been much further along and would have been provided on the same basis that North Carolina now provides funds. Although I fully understand the generators' concern about the money which has been spent, their reluctance to rally to this need conveys a lack of commitment and sense of urgency toward the project. We would have expected the generators' group, the Compact Commission, and all other member states to be very strong allies of what we were trying to do on their behalf.

In summary, the Authority finds itself in the following position:

1. The Compact Commission has cut off project funds even though the Authority has met its project targets and is making good technical progress. Funding cessation was based upon the Authority's failure to obtain alternative funding agreements or to agree on the MOU by 12/1/97, a date which was unrealistic as the Authority told the SECC on numerous occasions and specifically at its November 1997 meeting in Norfolk. The Compact has cut off funding despite the fact that it currently has enough unreserved money available to proceed with the Licensing Work Plan beyond what the Authority believes is the key decision point, where success or failure will be much more predictable.

2. The generators' group has refused to commit to provide additional project funding as a grant, even though that funding will not be needed until mid-1999, at which time development will be much further along and the generators would retain the right to decide not to fund at that time.

3. Present Compact law makes it virtually impossible to issue revenue bonds. For that reason the Authority agrees that a contract between it and the generators is required in order to get construction funding. The current MOU, however, contains requirements which would also make it impossible to issue revenue bonds. While the Authority feels that it might be possible to develop an agreement which permits North Carolina to issue bonds and satisfies the needs of the

generators, developing such an agreement will take time and could [page 3] not have been done by 12/1/97.

In view of all the above, the Authority voted at its December 19 meeting that it has no alternative but to commence the orderly shutdown of the project pending the compact's reversal of its funding position or receipt of other instructions from the North Carolina Legislature.

It is extremely unfortunate that the Compact's actions have caused the project to be stopped. We have worked hard and made very good strides toward resolving the technical issues which plagued us in prior years. The Authority has no real choice but to commence a project shutdown given the generators' lack of commitment and the Compact's unwillingness to spend its existing funds.

Sincerely,

/s/ Warren G. Corgan
Warren G. Corgan, Chairman

cc: Walter B. Sturgeon
Richard B. Whisnant
Andrew A. Vanore, Jr.
Representative W. W. "Dub" Dickson
Southeast Compact Member State Governors

AUTHORITY MEETING – DECEMBER 19, 1997

The following motion was made by Authority Member Nick Long, seconded by Douglas Story, and unanimously passed:

In response to the Southeast Compact Commission's letter of December 1, 1997, and

Because of the Compact's cut-off of project funding for purely non-technical reasons and despite the Authority's successful accomplishment of Decision Points 1 & 2, and

Because of the Compact's insistence that the Authority agree in principle to the terms of the proposed "Memorandum of Understanding" (MOU) by the unreasonable deadline of December 1, 1997, despite the fact that the MOU seeks to impose unreasonable or unworkable requirements on the Authority or the State, and

Because of the Compact Commission and its member states' refusal to commit unconditionally to the North Carolina project, and

Because of the Compact's refusal to spend its unreserved funds on hand despite the fact that it would accomplish work on the Licensing Work Plan to or through Decision Point 5 and/or to seek alternative funding, including assessments by member states, and

Because of the fact that present compact law makes it virtually impossible to issue revenue bonds for the project because a party state may withdraw from the compact after construction financing is needed, and

Because of the fact that by its actions the Compact has failed to honor its obligations and duties to the Authority,

the State of North Carolina, and other member states, and made further performance by the Authority nearly impossible,

I move that the Authority direct its contractors, consultants, and staff to begin the orderly shutdown of the project pending the Compact's reversal of its funding position or receipt of other instructions from the North Carolina Legislature,

and that the Authority authorize and direct its Chairman, in consultation with Staff and the Chairman of the Legal and Finance Committee, to so inform the Compact Commission.

FULL AUTHORITY MEETING – DECEMBER 19, 1997

The following motion was made by Authority Member Bob Heater, seconded by John Hairr, and unanimously passed;

Whereas, the Southeast Compact Commission (Compact) has cut off project funding for purely non-technical reasons and despite the North Carolina Low-Level Radioactive Waste Management Authority's (Authority) successful accomplishment of Decision Points 1 & 2, and

Whereas, the Authority has no other source of funding with which to continue the Licensing Work Plan activities, and;

Whereas, the State of North Carolina, including the Authority, cannot commit to the terms and conditions

required by the Compact and the Southeast Generators' Group for the resumption of funding of Licensing Work Plan activities, and;

Whereas, the Authority has certain statutory obligations with respect to the work completed and in progress to date for the facility development, and;

Whereas, the Authority has limited funds with which to satisfy some or all of said obligations;

Be it hereby Resolved, that the Authority finds that it has no other alternative than to begin an orderly cessation of facility development activities, including commencing the restoration of the preferred site, so that the project work can be preserved until such time as the Authority can receive instruction from the North Carolina General Assembly with regard to continuing the Authority's statutory mission.

To accomplish the objective of this resolution, I move that the Authority direct its contractors and staff to do the following:

> Complete the work authorized at the November 25, 1997 Authority meeting, which includes maintaining a basic project team through the month of December 1997 and completing final revisions to the documentation and reports for Decision Point 1;
>
> Commence and complete the orderly collection of all outstanding project records and the archiving of said records at the Morrisville office of Harding Lawson Associates so that the records may be easily retrievable in the event that the project is restarted;

Complete all of the above at a total cost for all contractors not to exceed $519,058, which includes the $189,058 already authorized;

Begin site restoration activities at a total cost for all contractors not to exceed $100,000, based upon a defined scope of work developed with the advice and consent of the Technical Committee; * * *

APPENDIX V

[Names Omitted In Printing]

[LOGO] Southeast Compact Commission
for Low-Level Radioactive Waste Management

April 26, 1999

The Honorable James B. Hunt
Governor
State of North Carolina
116 West Jones Street
Raleigh, NC 27603-8001

Dear Governor Hunt:

The Southeast Compact Commission for Low-level Radioactive Waste Management held its meeting in Raleigh on April 20 and 21, as scheduled, to discuss efforts in North Carolina to fulfill the State's legal obligations to the region since the cessation of siting activities in December 1997. The Commission was disappointed that you were unable to attend.

At the meeting, the Commission heard a status report from the North Carolina Low-Level Radioactive Waste Management Authority, the agency charged by the North Carolina General Assembly with developing a disposal facility for the region's low-level radioactive waste. The North Carolina Low-level Radioactive Waste Management Authority reported no efforts to resume site development activities since December, 1997, when the Authority discontinued its efforts to site a disposal facility.

The Southeast Compact Commission has asked me to notify you that the State of North Carolina is obligated under Southeast Compact law to provide a low-level radioactive waste disposal facility for the region. The Commission believes that the State of North Carolina currently stands in violation of the compact law, threatening the health and safety and economic well-being of the citizens of seven states, by failing to proceed with the process of providing for the disposal of the region's radioactive waste.

Further, the Commission respectfully requests that you provide the Commission with a written plan and schedule for North Carolina to return to a state of compliance with the compact law and ultimately to provide a disposal facility for the region. The motion adopted by the Commission is enclosed.

I realize that the General Assembly is still in session; however, a prompt response to this request is imperative. Should you have any questions, please contact me at (813) 289-6200, extension 3150, or Kathryn Haynes, the Executive Director of the Commission, at (919) 821-0500.

Sincerely,

/s/ Richard S. Hodes
Richard S. Hodes, M.D.
Chairman

Enclosure

cc: Southeast Compact Commission

Recommendation from a Joint Meeting of the Policy and Planning Committee and the Monitoring Committee 4/20/99

Adopted April 21, 1999

It is recommended that the Chairman of the Commission be directed to write a letter to the Governor of North Carolina and to the leadership of the North Carolina General Assembly, with copies to the North Carolina Low-Level Radioactive Waste Management Authority stating the following:

- that the State of North Carolina is obligated under Southeast Compact law to provide a low-level radioactive waste disposal facility for the region;
- that the Southeast Compact Commission believes that the State of North Carolina currently stands in violation of the compact law, threatening the health and safety and economic well-being of the citizens of seven states, by failing to proceed with the process of providing for the disposal of the region's low-level radioactive waste; and
- that the Southeast Compact Commission requests the leadership of the North Carolina General Assembly to respond in writing with a plan and schedule for North Carolina to return to a state of compliance with the compact law and ultimately to provide a disposal facility for the region.

APPENDIX W
SANCTIONS COMPLAINT

Complaint

By its actions to cease all activities in pursuit of a license to build the second regional low-level radioactive waste (LLRW) disposal facility for the Southeast Interstate Low-Level Radioactive Waste Compact (Compact), the State of North Carolina has failed to fulfill its obligations as a party state of the Compact and as the second host state under the Southeast Interstate Low-Level Radioactive Waste Compact law (Compact Law) to provide a disposal facility for the Southeast region. North Carolina has not provided any promise or evidence of its intention to provide funding for the resumption of work on the project.

Furthermore, the North Carolina Low-Level Radioactive Waste Management Authority (Authority) has received a total of $79,930,337 (Attachment 1) from the Southeast Interstate Low-Level Radioactive Waste Compact Commission (Commission) for the purpose of developing a disposal facility, yet has not provided a facility for the region. North Carolina received the funds from the Commission with the full knowledge that it was expected to develop a facility for the Compact.

Authority for Complaint

The authority for this complaint is Article 7(F) of the Compact which empowers the Commission to impose sanctions against party states. Article 7(F) provides that any party state which fails to Comply with the provisions

of this compact or to fulfill the obligations incurred by becoming a party state to this compact may be subject to sanctions by the Commission, including the suspension of its rights under this compact and revocation of its status as a party state."

The process for implementing Article 7(F) is set out in the "Administrative Sanctions Procedure" adopted by the Commission on April 5, 1990.

Supporting Statements

- North Carolina accepted the terms and conditions of the Compact when the North Carolina General Assembly enacted the language of the Compact into North Carolina General Statute 104F in 1983.
- North Carolina was designated as host state for the second regional disposal facility on September 11, 1986 by a two-thirds majority vote of the Commission. This selection followed a lengthy screening and review process conducted by the Commission and outside consultants.
- The North Carolina General Assembly accepted the designation as the second host state in 1987 when it created the Authority by enacting North Carolina General Statute 104G. The Authority was given the responsibility for selecting and developing a site for a regional LLRW disposal facility and for providing for its operation, closure and post-closure control. The North Carolina General Assembly acknowledged its host state obligations when it repeatedly provided general state funds for the Authority, the Division of Radiation Protection and other state agencies involved in the license review process. The legislature also appropriated $16 million of general funds to the Authority for the initial site selection process.

- North Carolina has not provided any additional funding directly for the site selection process since October, 1989, when the Commission, acting on a recommendation from the Authority, voted to voluntarily provide funding for site development. Note that Article 4(K) of the Compact Law states that "the Commission is not responsible for any costs associated with the creation . . . [or] the operation of any facility."

- The Commission collected fees from both regional and out-of-region generators using the first regional disposal facility in Barnwell, South Carolina to voluntarily provide funds to North Carolina for the site selection process. The attached financial reports and minutes (Attachment 2) show funds provided to the Authority to develop the facility and the mechanisms used to generate those funds.

- South Carolina withdrew from the Compact in 1995 in large part because of the lack of progress in the North Carolina siting process. Since then, the Commission has not had a source of funds from either the Barnwell, South Carolina facility or from the anticipated second disposal facility in North Carolina. The Commission has grown increasingly concerned over the shortfall of funds needed to develop the North Carolina facility and its ability to generate funds needed for the development of the next regional facility and future Commission operations. That concern was initially expressed in a letter to Governor Hunt dated January 5, 1996 (Attachment 3) informing him that the State will need to develop a plan for fulfilling its obligations to the Compact.

- The Commission has worked with the Authority, regional generators, and others to develop a comprehensive plan to provide funding for completion of the facility. The Commission notified North Carolina on August 28, 1997 (Attachment 4) that funding would

not be provided for work done by the Authority beyond November 30, 1997 until the funding issue is resolved and that the Commission expects North Carolina to continue its siting activities.

- On December 19, 1997 the Authority voted to shut down the project pending receipt of instructions from the North Carolina General Assembly or additional funding from the Commission. The attached letter of December 19, 1997 from Mr. Warren Corgan, Chairman of the Authority, to Richard S. Hodes, Chairman of the Commission, includes the motions approved by the Authority (Attachment 5).

- The attached statement (Attachment 6) of Mr. Walter Sturgeon, Executive Director of the Authority, indicates the project was shut down in early 1998. Furthermore, as recently as April 21, 1999 the Authority has not resumed any activities to develop a disposal facility and has stated that it has no plans to do so unless the Commission provides funding.

Recommended Sanctions

It is recommended that the Commission impose the following sanctions against North Carolina for its failure to fulfill its obligations as a party state of the compact and as the second host state under the Compact Law to provide a disposal facility for the Southeast region:

- Require the return of the $79,930,337 plus interest for the funds voluntarily provided by the Commission to North Carolina and damages for loss of a source of funds for the Commission operating budget and development of future regional facilities.

- Recover $2500 per day from North Carolina for every day beyond August 1, 2001 that an

acceptable disposal facility is not provided for use by Southeast regional generators.

- Limit export for treatment, storage or disposal of waste from North Carolina generators at the Envirocare of Utah facility in Clive, Utah, the Chem-Nuclear Systems, Inc. facility in Barnwell, South Carolina, or any other facility which may accept LLRW from regional generators in the future until a regional facility in North Carolina is opened.
- Prohibit the use by North Carolina generators of processing facilities located in the Southeast Compact states until North Carolina opens a facility.
- Require North Carolina to store all waste from the region until a new regional facility is provided.
- Direct the Chairman and the Executive Director, working with outside counsel, to go directly to court for a declaratory judgment to require North Carolina to provide a facility or a court order for recovery of funds, interest, and damages.

Filed by the State of Florida this 21st day of June, 1999.

/s/ Richard G. Hunter
Richard G. Hunter, Ph.D.
Commissioner,
State of Florida

/s/ Richard S. Hodes
Richard S. Hodes, M.D.
Commissioner,
State of Florida

Filed by the State of Tennessee this 21st day of June, 1999.

/s/ Michael Mobley
Michael Mobley
Commissioner,
State of Tennessee

/s/ Debra Shults
Debra Shults
Alt. Commissioner,
State of Tennessee

APPENDIX X

(LOGO)

State of North Carolina
Department of Justice
P.O. Box 629
RALEIGH
27602-0629

MICHAEL F. EASLEY
ATTORNEY GENERAL

Phone: (919) 716-6400
Fax: (919) 716-6750

December 1, 1999

Richard S. Hodes, M.D., Chairman
Southeast Compact Commission for Low-Level
Radioactive Waste Management
21 Glenwood Avenue, Suite 207
Raleigh, North Carolina 27603

Dear Dr. Hodes:

This letter shall serve as North Carolina's response to letters from the Compact Commission to Governor James B. Hunt, Jr., Lieutenant Governor Dennis A. Wicker, President Pro Tempore of the Senate Marc Basnight, and Speaker of the House of Representatives James B. Black, providing formal notice of a sanctions hearing to be held on December 8, 1999, in Atlanta, Georgia. At that hearing we are told that the Compact Commission intends to hear evidence and consider proposed sanctions against North Carolina for an alleged failure to "fulfill its obligations as a party state of the Compact and as the second host state . . . to provide a disposal facility for the Southeast region."

North Carolina joined the Compact in 1983 as a result of the ratification of the Compact agreement by the North Carolina General Assembly. This legislation was enacted with the intent and understanding that the agreement required a cooperative effort by the party states to develop safe facilities for the storage and disposal of low-level radioactive waste generated in the southeast region. This cooperative effort included the distribution of development costs on an equitable basis. As the designated second host state for a facility, North Carolina has incurred costs in excess of 50 million dollars in carrying out its responsibilities. From 1988 through 1997 the Compact Commission consistently provided supplemental funding for the development process as required by the Compact agreement.

In December, 1997, however, the Compact Commission terminated supplemental funding of the project, thereby shifting the total economic burden to the taxpayers of North Carolina. As a result of this breach of the Compact agreement, the North Carolina General Assembly concluded that North Carolina had no option but to exercise its right under Article VII(g) of the Compact law to withdraw from the Compact. Senate Bill 247 was enacted by the General Assembly on July 26, 1999, formalizing North Carolina's withdrawal from the Compact. The Compact Commission was informed of this action on that same date by Representative George W. Miller, Jr.

[page 2] In response to North Carolina's refusal to accept the entire economic burden of licensing and constructing a disposal facility the Compact Commission has now initiated a sanctions proceeding against North Carolina. Having withdrawn from the Compact, however,

North Carolina is no longer legally subject to the terms of the Compact agreement or the jurisdiction of the Compact Commission. Furthermore, it is North Carolina's position that the Compact Commission has no authority under the Compact agreement to conduct a sanctions proceeding against a state that has voluntarily withdrawn from the Compact. For those reasons, and after careful consideration by all concerned, it has been decided that North Carolina will not participate in the sanctions proceeding and will vigorously oppose any effort by the Commission to impose sanctions or retain further jurisdiction over this state.

Prior to termination of supplemental funding by the Compact, North Carolina, at great cost, consistently progressed toward a licensing decision as required by the Compact agreement, acting at all times in good faith, but without compromising the level of scientific and regulatory scrutiny required to protect the safety, health and welfare of the people of this state. North Carolina will continue to take all appropriate measures to provide for the storage and disposal of radioactive waste generated in North Carolina in accordance with federal and state laws and regulations.

Sincerely,

/s/ Michael F. Easley
Michael F. Easley

APPENDIX Y

[Names Omitted In Printing]

[LOGO] Southeast Compact Commission
for Low-Level Radioactive Waste Management

BY CERTIFIED MAIL

November 8, 1999

The Honorable James B. Hunt Jr.
Governor
State of North Carolina
Office of the Governor
Raleigh, NC 27611

Dear Governor Hunt:

On June 21, 1999, the states of Florida and Tennessee filed a formal sanctions complaint with the Southeast Compact Commission in accordance with Article 7(F) of the Southeast Compact law. The complaint claims that the State of North Carolina is in violation of the compact law for failure to "fulfill its obligations as a party state of the Compact and as the second host state . . . to provide a disposal facility for the Southeast region." It further claims that the "North Carolina Low-Level Radioactive Waste Management Authority (Authority) has received a total of $79,930,337 from the Southeast Interstate Low-Level Radioactive Waste Compact Commission (Commission) for the purpose of developing a disposal facility, yet has not provided a facility for the region." The Commission reviewed the complaint and decided to hold a sanctions hearing in accordance with its Administrative Sanctions Procedure.

This letter serves as formal notice that a formal, quasi-judicial sanctions hearing will be held by the Commission at 8:30 a.m. on December 8 in Atlanta, Georgia to address the complaint against North Carolina. A meeting notice is enclosed.

The Commission will meet on December 9 to decide, based on the evidence presented at the hearing, whether North Carolina violated the compact law. If the Commission finds a violation, it will also vote on a sanction appropriate to the violation.

As a party to the sanctions hearing, North Carolina has the right to fully participate in the proceedings. The Commission's sanctions procedure and the hearing guidelines that describe the parties' rights and responsibilities during the hearing are enclosed. Please notify the Commission offices as to who will represent North Carolina in the proceedings.

It is the policy of the Commission to try to resolve all grievances before the initiation of formal proceedings. Settlement is encouraged during any stage of the sanctions procedure.

I would be pleased to answer any questions you may have with regard to the sanctions process.

Sincerely,

/s/ Kathryn V. Haynes
Kathryn V. Haynes
Executive Director

Enclosures

APPENDIX Z

ATTORNEY GENERAL MIKE EASLEY'S RESPONSE TO THE DECISION BY SOUTHEAST LOW-LEVEL RADIOACTIVE WASTE COMPACT COMMISSION TO IMPOSE SANCTIONS AGAINST NORTH CAROLINA

FOR IMMEDIATE RELEASE

CONTACT: Carl Hepp (919) 716-6413 or Amanda Crumley (919) 716-6412
December 9, 1999

Today, the Compact Commission voted unanimously to impose sanctions against North Carolina for withdrawing from the Compact. The sanctions include repayment of $80 million plus interest in funds advanced to North Carolina for the Compact project. In addition, they are seeking the recovery of $10 million in lost future revenue for the project and payment of all attorneys fees for the Compact to enforce the sanction. The deadline for payment of this money is July 10, 2000. North Carolina did not participate in the sanctions hearing.

"We clearly stated North Carolina's position regarding the sanctions hearing to the Compact Commission last week. The Compact has neither the means nor the authority to enforce these sanctions."

"We do not need to wait until next July to give the Compact Commission North Carolina's answer. The Answer is 'NO'."

"When the Compact breached its agreement with North Carolina and it became clear that the Compact did not

share North Carolina's concerns for the safety of citizens or the environment, the legislature legally withdrew from participation. Since North Carolina is no longer a member of the Compact, the Compact has no authority to impose sanctions on the State."

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North Carolina Department of Justice
Public Information Office
P.O. Box 629
Raleigh, NC 27602-0629
Telephone: (919) 716-6412 or 716-6413
Fax: (919) 716-6750
E-mail: agjus@mail.jus.state.nc.us

APPENDIX AA

SANCTIONS HEARING
SOUTHEAST COMPACT COMMISSION

Proceedings before Curtis Van Kann, Hearing Officer, reported by Michael R. Brentano, Certified Court Reporter and Notary Public, at Embassy Suites Hotel, 4700 Southport Road, College Park, Georgia, on the 8th day of December, 1999, commencing at the hour of 8:30 a.m.

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* * *

[page 13] The State of North Carolina has, by its actions, left the Compact with no recourse but to take sanctions against it to recover its funds. However, nothing can reclaim the time that has been lost. Once again, the Southeast Compact is faced with a prospect of numerous facilities within our states either storing waste indefinitely or terminating those operations which utilize radioactive materials due to the lack of disposal facility.

And that's the end of my statement.

MR. VAN KANN: All right, thank you, Commissioner Mobley. It occurs to me that the statement that you have just made is probably part opening statement and part testimony because there were certain factual matters there. And I think in order to be in accord with the procedures adopted by the Commission, I'd like to give you a retroactive oath that the testimony that you

have just given, to the extent it is testimony, is – can be under oath for purposes of any review.

Would you raise your right hand. Do you solemnly swear that the testimony you've just given is true and correct to the best of your knowledge and belief so help you God?

MR. MOBLEY: Yes, sir.

* * *

[page 34] concerns over management and time frames of the project. We have worked with the Authority, regional generators, and others to develop a comprehensive plan to provide funding for a completion of the facility. And once again, because of funding issues and work issues on their part, that plan was never executed to its full extent.

On December 19th, 1997, the Authority voted to shut down the project, pending receipt of instructions from the North Carolina General Assembly or additional funding from the Commission. And I believe one of those letters may already be in as an attachment. If I've duplicated some attachment there already, I apologize. But that letter is December 19th, 1997.

And finally, I would like to acknowledge Exhibit 3, which is the letter previously mentioned in which North Carolina has stated that they have withdrawn from the Compact and will not be participating in any further actions. My point is that despite having no mandate to fund the project, this commission has done that to over $79 million, that North Carolina enjoyed substantial benefits in protecting its public health as a member of this Compact through the years, and that when it came time

[page 35] for them to do their part, as was voted in accordance with the Compact and to be the next host state, they were unable to meet those obligations in a timely manner and ultimately decided that they would not play.

And that's the end of my testimony.

MR. VAN KANN: All right. Thank you, Mr. Hunter. Let me ask if members of the Commission, commissioners, have any question for this witness. Again, we will start on the left and maybe just go right down the line starting with Commissioner Burks [sic] any questions?

Mr. Setser, any questions?

MR. SETSER: Yes, just briefly.

EXAMINATION

BY MR. SETSER:

Q. Coming from the perspective of various commission meetings that have been held an [sic] presentations and instructions we received from the executive director of the North Carolina Low Level Waste Management Authority, and at times from the Division of Radiation Protection in the State of North Carolina, have you – can you recall any specific instructions or guidance that had been given by either the general assembly or the governor to expedite of [sic] facilitate the development of a site?

* * *

[page 40] to demonstrate that the governor very clearly was apprised and knew what was required of the State.

Q. The Authority law speaks to the issue of paying back the expenses for siting the disposal site. What does the law say about that?

A. You'd have to refresh my memory. I believe after operation, they can collect those.

Q. And do you know how those funds were generated?

A. How they would be generated? By fees of people disposing of waste.

Q. The generators?

A. Right.

Q. That would be after –

A. You'd obviously have to have a site to do that.

Q. Correct. And those fees would go back to the host state, correct?

A. That's correct.

MR. JONES: No more questions.

MR. VAN KANN: Mr. Buckner, any questions?

MR. BUCKNER: I have none.

MR. VAN KANN: Miss Walters, any questions?

MS. WALTERS: No.

MR. VAN KANN: Any other members of the

* * *

[page 54] MR. MOBLEY: Not specifically. It just – it was within a very short time frame, but I don't remember.

Q. (By Mr. Jones) At the time you had filed the complaint, how far had North Carolina progressed at that site?

A. They had shut down work by that time. And their work had gotten to a point where they felt like if they had all the remaining money that the Compact had given to them plus some additional funding, that they might be able to come to a decision on whether the site was capable of being licensed.

Q. When Barnwell closed – you've cited in your complaint that in 1995, South Carolina withdrew from the compact. When a source of funding from Barnwell was cut off to the Commission, was there any other major source of funding to the Commission from which funds could be given to the State of North Carolina?

A. No. We had no other funding other than some interest on our accrued funds.

Q. You spoke at the beginning of your testimony about the trade-off and benefits to a state being a member of the compact. In terms of North Carolina, could you elaborate on that? Would that mean they had access to Barnwell?

* * *

[page 62] processed and disposed of.

Q. I think there was a question earlier about – go ahead.

MR. HAWKINS: Please finish, I'm sorry.

MS. SHULTS: Go ahead.

MR. HAWKINS: Judge, may I? Dealing with –

MR. VAN KANN: Just again –

MR. HAWKINS: Charles Hawkins, commissioner from Virginia.

RE-EXAMINATION

BY MR. HAWKINS:

Q. Dealing with the financial aspects of the process. I was not a member of the Commission when the original compact law was passed. But there was some reference made in some of the correspondence I believe I read from the State of North Carolina about they refused to accept the entire burden of financial responsibility of building the site. In the original compact law itself, was it not a fact that the host state had the total responsibility of building the site and was not the Commission prohibited from investing money into the development of that site? Was that a fact?

A. I think that it's certainly true that the intent was that the host state would develop – would [page 63] expend the funds to develop the site and the concept was that they then would be able to recoup those costs by charging appropriate fees for the disposal of the waste. And it's clear that the compact legislation indicates that the compact does not have to pay for the disposal – development of the disposal site. I don't think it prohibits

the Commission or the Compact Commission from assisting the state, but it does indicate that there is no requirement that we assist the state.

Q. Follow-up question, please, sir. But weren't – in fact, didn't we change the state compact laws to allow us to put moneys into the State of North Carolina and development of the site and the original compact law that was passed by the legislatures of participating states clearly stated that the responsibility was of the host state and that the general assembly of North Carolina passed that in full understanding of their financial responsibility?

A. It's certainly true in the original compact legislation that they passed it that way. The amended – the amended or – or activities to amend the compact, I think, only addressed the question of whether a state could withdraw from the compact. This was after the designation of North Carolina.

* * *

[page 82] through that represented the State of North Carolina and not either the Authority or an individual agency. And we were told that his existing commissioners were people to represent the State of North Carolina.

Q. And then right about the same time, in June, which was just before that, in this letter says, Commission believing it was not prudent to spend commission funds expressed strong doubt that the project would ever be completed. I was looking for evidence of this doubt because the only thing I can determine was that Hunt had said – Governor Hunt had replied in correspondence that he supported the project but he needed money to carry it

forward. And I was curious about if there were other statements that were not in the record by the governor or other elected officials that would indicate this – the genesis for the strong doubt.

A. Well, there are two issues. Let me first comment on the latter one, the money. There has never been an indication where the Compact Commission has indicated its unwillingness to continue to use the funds it had at its disposal to fund the State of North Carolina as it went forward to develop the site. It was only when we got to the point where we – the projections for licensure of the site, both time and [page 83] cost, became more than the money that we had in the bank to cover, thus creating a potential shortfall of several million dollars, and I don't remember the exact number at this point in time.

And it was then that we created a task force which Commissioner Mobley chaired with a number of stakeholders to try to develop a funding mechanism to cover that shortfall. And one was developed and, of course, as we remember serving on it, the State of North Carolina did not accept that funding proposal, nor did they come back with one of their own that was an alternate or better or different from that that would allow the shortfall to be met so that it could go forward. It was only after that time when there was no hope of having moneys to reach the target date that the Commission decided it was not prudent to expend what reserve funds it did have in the bank to continue the process.

So from a funding standpoint, we've always been on record as indicating we were willing to fund with what moneys we had. But remember that when the State of

South Carolina withdrew from the compact as a party state, it was, in effect, prior to that time the enabling mechanism for the collection of fees since they had control of the fees that the generators paid [page 84] in order to dispose of waste at the site. So that was the mechanism. So whenever they withdrew as a party state, that mechanism went away and, therefore, the only income and the only moneys that the Compact Commission had available to it was the interest earned on the existing principal that it already had in the bank and there was not going to be a continuing source of funds to either provide North Carolina or to even support the budget of the Compact Commission. So that's the discussion of funding as I recall it.

And refresh my memory on the other issue.

Q. The strong doubts, where –

A. The doubts arose out of the continued moving target as far as completion of tasks and timetables moving toward an overall goal of satisfying the licensing agency. It was definitely a moving target that didn't stay in one place. And this caused considerable doubt. And as a result, we expressed this strong reservation to North Carolina.

In fact, we enacted a resolution requiring them to develop a coordinated work plan that was agreed to by both the Authority and the licensing agency with milestones and projections of cost in order to allow this to go forward. At which time the State of North Carolina hired another contractor, Harding Lawson

* * *

[page 91] for environmental reasons, or for just the ability to do it in just a much easier manner, there has to be some understanding that commitments are made.

The process that I understand was one that went through a designation of points for the states and everyone agreed that that would be the end result of the host state first time around. And North Carolina had the points, it's my understanding, I was not here at the time. The legislation that went through the bodies of the general assemblies of all the states said, in fact, we were going to work together for the mutual benefit of all the people in our area.

If compacts have no more validity than this one does, and being able to withdraw at a time that you feel is to your convenience, the whole concept falls apart. And we all lose from that. This goes beyond this compact, this goes beyond this group of states, this goes into the arena of what we can depend on as we enter into agreements among consenting states for the betterment of our citizens. And if, in fact, compacts cannot stand the test of troubled waters, the validity of those compacts are not going to last.

And I would think, too, Judge, at this juncture if, in fact, this does take the course that it seems to be taking, and if something is not in place to [page 92] bring some sort of stability to the commitments made, no state, no general assembly will be willing to go on record to support any other compact with their moneys or their time or their efforts, knowing full well that at any point during the process, a state can withdraw based on the whim of

that particular legislative body. And that's no way to build agreements, sir. Thank you.

MR. VAN KANN: Any questions for Commissioner Hawkins? Yes, sir, Commission [sic] McNeer.

MR. McNEER: A.C. McNeer. I have no question, I just want to confirm my opinion one hundred percent of what he's just said. I think he's absolutely correct that if we don't resolve this issue here, it has national implications and, for the future of the compact system itself, I think we have to resolve it in a responsible way or we're inviting trouble.

And I commend you for your comments as always. Thank you.

MR. VAN KANN: Any other commissioners have any statements or questions with respect to Commissioner Hawkins? Any member of staff or counsel? Thank you, Commissioner.

Any other commissioners from Alabama, Georgia, Mississippi, or Virginia wish to offer [page 93] anything at this time? Okay. Seeing none, I'll assume that we can move on.

I did note earlier that the Commission received a letter from the Attorney General of North Carolina dated December 1, 1999. A copy of it is in the back of the room and I certainly won't undertake to read it in its entirety. It has been made an exhibit to this record, Exhibit 3. And among other things, the letter says that after careful consideration by all concerned, it has been decided that North Carolina will not participate in the sanctions proceeding.

And I'm advised that the Commission has not received any subsequent communication from North Carolina changing that position. Nevertheless, if there is anyone in the room representing the State of North Carolina who wishes at this point to be heard by way of evidence or documentary submissions, he or she is certainly welcome to come forth and be heard.

Well, seeing no one rushing to the front, I think we can move on to the next phase of the proceeding. And that is for closing statements of the complainant parties, Florida and Tennessee. Any of the representatives of those states would like at this point to offer a closing statement, they may certainly do that. And after that, we will move to the stage of

* * *

APPENDIX BB

RESOLUTION

Adopted 12/9/99

WHEREAS, the Southeast Compact Commission for Low-Level Radioactive Waste Management ("Commission") has determined that the State of North Carolina failed to comply with the provisions of the Compact and failed to fulfill the obligations incurred by becoming a party state to this Compact; and

WHEREAS, according to Article VII(f) of the Compact law, North Carolina is subject to sanctions by the Commission.

NOW THEREFORE, pursuant to Article VII(f), the Commission resolves as follows:

The State of North Carolina shall pay to the Commission the sum of $79,930,337, the amount of funds provided by the Commission to North Carolina for the development of a regional low-level radioactive waste disposal facility, plus interest at the applicable legal rate from the date by which the North Carolina Low-Level Radioactive Waste Management Authority ceased activities to develop a regional disposal facility, January 1, 1998;

The State of North Carolina shall pay to the Commission the sum of $10 Million resulting from the loss of a source of funds for the Commission operating budget for a period of twenty years, the term of operation for a regional disposal facility;

The State of North Carolina shall pay to the Commission its attorney's fees incurred since the date of the

sanctions complaint filed by the States of Florida and Tennessee, June 21, 1999, in connection with the sanctions proceeding and any further enforcement actions resulting from North Carolina's violation of the Compact;

The sums provided above shall be paid in full by July 10, 2000; and

In the event of default, the Executive Director of the Commission is directed to work with outside counsel to take such enforcement actions, including litigation, as necessary to collect all unpaid sums.

For the purposes of and in accordance with Article VII(f) of the Southeast Compact, the rights and obligations incurred by the State of North Carolina as a party state to the Compact, including those incurred as a host state, shall remain in full force and effect until the terms of the sanction are complied with and satisfied in full, as determined by the Southeast Compact Commission in its sole discretion.

Supreme Court, U.S.
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No. 00-131

IN THE

Supreme Court of the United States

OCTOBER TERM, 2000

K.D.M., a minor, by and through his father and next friend, W.J.M.,

Petitioner,

v.

REEDSPORT SCHOOL DISTRICT and NORMA PAULUS, in her official capacity as Oregon Superintendent of Public Instruction,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF THE BECKET FUND FOR RELIGIOUS LIBERTY AS *AMICUS CURIAE* IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI BY PETITIONER K.D.M.

KEVIN J. HASSON*
ERIC W. TREENE
ROMAN P. STORZER
ANTHONY PICARELLO
THE BECKET FUND FOR
RELIGIOUS LIBERTY
1350 Connecticut Ave., N.W.
Suite 605
Washington, D.C. 20036
(202) 955-0095
**Counsel of Record*

August 23, 2000

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IN THE

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BRIEF OF THE BECKET FUND FOR RELIGIOUS LIBERTY AS *AMICUS CURIAE* IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI BY PETITIONER K.D.M.

INTEREST OF THE *AMICUS*

Pursuant to Rule 37.3 of this Court, the Becket Fund for Religious Liberty respectfully submits this brief *amicus curiae* in support of Petitioner.[1] The Becket Fund is a bipartisan and

[1]All parties have consented to the filing of this brief. Letters of consent from the Petitioner and Respondents have been filed simultaneously with this brief. No counsel for any party authored this brief in whole or in part. No person or entity other than *amicus curiae*, its members, and its counsel made any monetary contribution to the preparation or submission of this brief.

interfaith public interest law firm that protects the free expression of all religious traditions. *Amicus* is frequently involved, both as counsel of record and as *amicus curiae*, in cases seeking to preserve the right of individuals and organizations to be free from discrimination based on their religious belief and practices.

Our present brief addresses the conflicting results reached by five federal circuits in determining the proper standard for reviewing laws that discriminate on their face against religion, and the problems inherent in the position adopted by the Ninth Circuit in the present case. In particular, this brief focuses on how the discrimination itself—rather than any subsequent "burden" on religious practice—constitutes the First Amendment violation.

SUMMARY OF ARGUMENT

Pursuant to an Oregon regulation, the Reedsport, Oregon School District denied petitioner KDM the ability to receive on-site benefits from a special education program solely on the basis of the religious character of his private school. OR. ADMIN. R. 581-015-0166(3) (1995). He would have been able to participate in the program had his school been a private, non-religious school. He was otherwise eligible to participate in the program.

The Ninth Circuit Court of Appeals reversed the District Court's ruling that the regulation violated the Free Exercise, Establishment, and Equal Protection Clauses. *KDM ex rel. WJM v. Reedsport School Dist.*, 196 F.3d 1046, 1049 (9th Cir. 1999), *reh'g denied*, 210 F.3d 1098 (Apr. 25, 2000). The court held that although the regulation "treats [students in religious schools] differently by denying them state services on the school grounds," no Free Exercise violation existed because the Petitioner did not prove any substantial "burden" on his

religious conduct. *Id.* at 1051.

The First Circuit has also adopted this standard—that the state may discriminate against individuals on the basis of religious belief and practice so long as the burden is not substantial. The Third, Sixth, and Eighth Circuits have adopted the opposite position: Plaintiffs need not prove that a substantial burden exists to obtain relief from a facially discriminatory law. The precedents of this Court support the latter view.

A substantial burden on religious exercise is a threshold requirement for claims seeking religious exemptions to generally applicable laws under the Free Exercise Clause. Such a showing has never been required by this Court in cases involving facial discrimination based on religion. But the court below, and the First Circuit, have grafted the substantial burden requirement taken from the exemption cases onto the separate and distinct line of Free Exercise cases involving laws that discriminate on the basis of religion. The Third, Sixth, and Eighth Circuits have held that no showing of substantial burden is required in Free Exercise cases alleging discrimination. This conflict among the Circuits regarding the basic components of a Free Exercise discrimination claim merits this Court's resolution.

ARGUMENT

The Court below has joined the United States Court of Appeals for the First Circuit in adopting a dangerous and unprecedented standard for reviewing laws that facially discriminate on the basis of religion. These two courts have held that a "substantial burden" on religious exercise—a concept borrowed from this Court's Free Exercise cases involving exemptions to generally applicable laws—must be shown before facial discrimination based on religion can run afoul of the First Amendment. These decisions stand in direct conflict with decisions of the Third, Sixth, and Eighth Circuits. The straightforward record in this case presents an ideal opportunity for this Court to clarify the appropriate Free Exercise standard for reviewing such laws.

1. THE FREE EXERCISE STANDARD CREATED BY THE NINTH CIRCUIT CONFLICTS WITH DECISIONS OF THIS COURT, AND THE THIRD, SIXTH, AND EIGHTH CIRCUITS.

The court below agreed with Petitioner's claim that the regulation at issue discriminates on the basis of religion. *KDM ex rel. WJM v. Reedsport School Dist.*, 196 F.3d 1046, 1050-51 (9th Cir. 1999). The regulation favors students who attend non-religious private schools over students who attend religious private schools. However, in a one-paragraph discussion, the court held that since the Petitioner had not proven a substantial burden on his free exercise of religion, no further review of the discriminatory regulation was necessary:

> That the regulation, standing alone, "discriminates" against students in religious schools, *i.e.*, treats them differently by denying them state services on the school grounds, does not result in a burden on the free exercise of

> religion by someone in the position of KDM or his parents. . . . The mere fact that the District makes its service to KDM available in the fire hall down the street from his school does not amount to suppression of religion or religious conduct.

KDM, 196 F.3d at 1051. The Ninth Circuit has thus adopted a standard whereby the state may discriminate against religion if such discrimination does not substantially burden religious exercise.

In doing so, the court relied on the First Circuit's opinion in *Strout v. Albanese*, 178 F.3d 57 (1st Cir. 1999) (rejecting claim that tuition grants for secular, but not religious, private schools violate the Free Exercise, Establishment, Equal Protection, Due Process or Free Speech Clauses), *cert. denied*, 120 S. Ct. 329 (1999). That court held that "the Free Exercise Clause [was] not implicated" where students were banned from participating in a tuition funding program because of the religious character of their private schools. *Id.* at 65. The First Circuit ignored the facial religious discrimination of the law, and held that because "education at a parochial school is not a [central belief or practice]" of the plaintiffs, there was no substantial burden on religious exercise and therefore no limitation on Free Exercise rights. *Id.*

The First Circuit and the Ninth Circuit appear to have conflated two distinct lines of cases in this Court's Free Exercise jurisprudence. In cases involving religionists seeking exemptions to generally applicable laws, this Court required as a threshold matter a showing of substantial burden on religious exercise. *See, e.g, Thomas v. Review Bd. of Indiana Employment Sec. Div.*, 450 U.S. 707 (1981) (unemployment compensation law); *Wisconsin v. Yoder*, 406 U.S. 205 (1972) (compulsory education law); *Sherbert v. Verner*, 374 U.S. 398

(1963) (unemployment compensation law); *Murdock v. Pennsylvania*, 319 U.S. 105 (1943) (solicitation ordinance). By contrast, in cases involving challenges to laws that discriminate against religion, this Court has required no such showing. *See, e.g., McDaniel v. Paty*, 435 U.S. 618 (1978) (constitutional provision prohibiting "ministers of the Gospel or priests of any denomination whatever" from serving as delegates to constitutional convention).[2]

As noted by the dissent below, and by six other judges of the Ninth Circuit dissenting from the denial of rehearing *en banc*, this Court's decision in *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993), should foreclose the panel's idiosyncratic view of the Free Exercise Clause. *KDM ex rel. WJM v. Reedsport School Dist.*, 210 F.3d 1098, 1099 (9th Cir. Apr. 25, 2000) (O'Scannlain, Kozinski, Nelson, Kleinfeld, Tashima, & Wardlaw, JJ., dissenting) ("It is only a matter of time before the Supreme Court confronts this confusion to make clear what should have already been clear to a faithful reader of [*Hialeah*].").

The principle adopted by this Court that "[a]t a minimum, the protections of the Free Exercise Clause pertain if the law at issue discriminates against some or all religious beliefs or regulates or prohibits conduct because it is undertaken for religious reasons," *Hialeah*, 508 U.S. at 532, does not rely upon a finding of additional "substantial burdens" on religious

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[2] *McDaniel,* in fact, precludes the Ninth and First Circuits' position, which was adopted by the Tennessee Supreme Court in that case. The state court held that the disqualification of clergy "simply does not impose any burden, direct or indirect upon religious belief or religious action." *Paty v. McDaniel*, 547 S.W.2d 897, 903 (Tenn. 1977). This claim was rejected by this Court, which required no such showing of burden on religious belief or action.

exercise. *Hialeah* made clear that the proper test is:

> if the object of a law is to infringe upon or restrict practices because of their religious motivation, the law is not neutral, . . . , and it is invalid unless it is justified by a compelling interest and is narrowly tailored to advance that interest.

Id. at 533. Moreover, "the minimum requirement of neutrality is that a law not discriminate on its face." *Id.* In this case, how far the Petitioner must walk to receive the benefit, and whether that is a substantial burden on his religion, does not in any way affect the basic fact that the government is facially discriminating against him based on his decision to attend a religious school. It is discrimination that may in the end be justifiable if the regulation is narrowly tailored to serve a compelling state interest, but it is discrimination nonetheless. And this Court has never required a showing of substantial burden in such cases.

Although the Ninth and First Circuits have thus permitted explicit, religious discrimination (subject to heightened scrutiny only when the discrimination substantially burdens religious exercise), the other courts that have considered this question have soundly rejected such a rule. *Brown v. Board of Mahaffey*, 35 F.3d 846 (3d Cir. 1994); *Hartmann v. Stone*, 68 F.3d 973 (6th Cir. 1995); *Peter v. Wedl*, 155 F.3d 992 (8th Cir. 1998). In each of these cases, the respective Court of Appeals ruled that facial discrimination itself violates the Free Exercise Clause when such discrimination cannot survive strict scrutiny.

The facts of *Peter* are nearly identical to the present case: a Minnesota law prohibited school districts from providing special education services at private religious, but not private non-religious, schools. *Peter*, 155 F.3d at 994. The Eighth

Circuit ruled that the "[g]overnment discrimination based on religion violates the Free Exercise Clause . . . the Free Speech Clause . . . and the Equal Protection Clause." *Peter*, 155 F.3d at 996. The precise extent of the harm suffered by that plaintiff was irrelevant; if the denial of services was based on religious discrimination, the plaintiffs were entitled to relief. *Id.* at 997-98.

Similarly, in *Brown*, where a Borough intentionally prevented individuals from accessing revival meetings, the Third Circuit properly held that issues of "substantial burden" were irrelevant in cases of discriminatory government action. *Id.* at 849-50 ("The rare cases which address acts or laws which target religious activity have never limited liability to instances where a 'substantial burden' was proved by the plaintiff.").

And in *Hartmann*, where religious child care centers were prohibited by Army regulation from participating in its Family Child Care program, the Sixth Circuit held that the plaintiffs did not need to demonstrate a substantial burden on the practice of their religion, but rather held that the discriminatory law was "'invalid unless it is justified by a compelling interest and is narrowly tailored to advance that interest.'" *Id.* at 979 (quoting *Hialeah*, 508 U.S. at 533).[3]

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[3]The Ninth Circuit's attempts to distinguish *Brown*, *Hartmann*, and *Peter* are deeply flawed. The court simply stated that the present case is "wholly unlike" *Brown* and *Hartmann*, without further explanation. *KDM*, 196 F.3d at 1050. It distinguished *Peter*, a nearly identical case, by arguing that the plaintiff there was burdened by having to enroll in a public school, rather than having to leave school premises for a certain period to receive the services at a nearby fire hall, as the Petitioner would be required to do. *KDM*, 196 F.3d at 1050-51. However, this distinction falls apart in light of the court's reliance on *Strout*, where the law at issue likewise would have

The logical implications of *McDaniel*, *Hialeah*, *Peter*, *Brown*, and *Hartmann* are clear: if a showing of substantial burden on religious exercise were necessary to challenge facially discriminatory laws, governments would be free to discriminate freely among religions, or between religion and irreligion, so long as the burden did not amount to a "substantial" one. Under the framework set forth by the court below, and by the First Circuit, a regulation relegating Presbyterians, atheists, or any religious person to the back of a city-operated bus would pass constitutional muster, since merely going to the back of a bus would not substantially burden the exercise of their chosen faith. *See Brown*, 35 F.3d at 849-50 ("Applying such a burden test to non-neutral government actions would make petty harassment of religious institutions and exercise immune from the protection of the First Amendment."). This the First Amendment cannot countenance.

The non-discrimination mandate of the Free Exercise Clause at issue in *Hialeah*, *McDaniel*, and this case reflects a principle also present in this Court's Equal Protection and Establishment Clause cases: that the government may only distinguish between persons based on their religion for reasons of the highest order. *See Everson v. Board of Educ.*, 330 U.S. 1, 16 (1947) (the State "cannot exclude individual Catholics, Lutherans, Mohammedans, Baptists, Jews, Methodists, Non-believers, Presbyterians, or the members of any other faith, because of their faith, or lack of it, from receiving the benefits of public welfare legislation"); *Larson v. Valente*, 456 U.S. 228, 245 (1982) ("This constitutional prohibition of denominational

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required the plaintiffs to leave their religious school to receive benefits. It is clear that the split between the Circuits is firm, and that the distinctions made by the Ninth Circuit do not justify its departure from a proper interpretation of *Hialeah*.

preferences is inextricably connected with the continuing vitality of the Free Exercise Clause."); *City of New Orleans v. Dukes*, 427 U.S. 297, 303 (1976) (constitutionality is presumed "[u]nless a classification trammels fundamental personal rights or is drawn upon inherently suspect distinctions such as race, religion, or alienage").

The concept of "substantial burden"—borrowed from the line of Free Exercise cases addressing the issue of whether the Constitution mandates religious exemptions to generally applicable laws, is as out of place in Free Exercise cases dealing with discrimination against religion, such as *McDaniel*, *Hialeah*, or this case, as it would be in Equal Protection cases or Establishment Clause cases involving sect preferences.

Under the Equal Protection Clause, it is well established that when laws treat individuals differently based on these classifications, it is the discriminatory treatment itself, not any subsequent burden, which violates the Constitution. *See, e.g., Reed v. Reed*, 404 U.S. 71, 76 (1971) (statute favoring fathers over mothers in the administration of a deceased child's estate held invalid). The Court in *Reed* did not weigh burdens, but rather held that the discrimination on its face violated the Constitution because the classification was wholly unrelated to the objective of the statute. *Id.* at 76 ("To give a mandatory preference to members of either sex over members of the other . . . is to make the very kind of arbitrary legislative choice" forbidden by the Constitution). A consistent feature of gender discrimination analysis is that facial discrimination itself is presumed invalid. *See Wengler v. Druggists Mutual Ins. Co.*, 446 U.S. 142, 150 (1980) (striking a statute that required widowers, but not widows, to show incapacitation in order to recover benefits for a spouse's death: "our precedents require that gender-based discriminations must serve important governmental objectives and that the discriminatory means

employed must be substantially related to the achievement of those objectives"); *Kirchberg v. Feenstra*, 450 U.S. 455, 459 (1981) (invalidating a statute that granted only a husband the right to manage and dispose of jointly owned property: "Because this provision explicitly discriminated on the basis of gender, the Court of Appeals properly inquired whether the statutory grant to the husband of exclusive control over disposition of community property was substantially related to the achievement of an important governmental objective.").

Discrimination based on national origin is also presumed invalid, without consideration of "burdens." This Court's decisions "have established that classifications based on alienage, like those based on nationality or race, are inherently suspect and subject to close judicial scrutiny." *Graham v. Richardson*, 403 U.S. 365, 372 (1971) (footnotes omitted); *id.* at 376 ("The classifications involved in the instant cases, on the other hand, are inherently suspect and are therefore subject to strict judicial scrutiny whether or not a fundamental right is impaired."). The same is true for racial discrimination. *Johnson v. Virginia*, 373 U.S. 61, 62 (1963) (per curiam) (overruling an African-American man's conviction for contempt following his refusal to sit in the "section reserved for Negroes," and holding that "[s]tate-compelled segregation in a court of justice is a manifest violation of the State's duty to deny no one the equal protection of its laws.").

Similarly, in *Larson v. Valente*, this Court did not need to examine whether discriminating against the Unification Church in a charitable solicitation statute burdened its members' faith or not—the discrimination itself was sufficient to trigger strict scrutiny. 456 U.S. at 246 ("In short, when we are presented with a state law granting a denominational preference, our precedents demand that we treat the law as suspect and that we apply strict scrutiny in adjudging its constitutionality.").

The same is true with Free Exercise claims involving discrimination, as *Hialeah* and *McDaniel* illustrate, and as the Third, Sixth, and Eighth Circuits have held. There is no basis in this Court's Free Exercise jurisprudence for borrowing the "substantial burden" requirement from cases involving generally applicable laws, and applying it to cases involving religious discrimination. By conflating these two lines of cases, the Ninth Circuit below and the First Circuit have created a new legal test governing claims of discrimination under the Free Exercise Clause. This test conflicts with the decision of three other circuits and represents a dramatic departure from this Court's precedents.

CONCLUSION

For the foregoing reasons the writ of certiorari to the Ninth Circuit Court of Appeals should be granted.

Respectfully submitted,

KEVIN J. HASSON*
ERIC W. TREENE
ROMAN P. STORZER
ANTHONY PICARELLO
THE BECKET FUND
FOR RELIGIOUS LIBERTY
1350 Connecticut Ave., N.W.
Suite 605
Washington, D.C. 20036
(202) 955-0095
Counsel for Amicus Curiae

August 23, 2000

**Counsel of Record*

(4)

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BRIEF *AMICUS CURIAE* OF THE INSTITUTE FOR JUSTICE, VERMONTERS FOR BETTER EDUCATION, INC., DR. BLANE NASVESCHUK, AND CYNTHIA BAGLEY IN SUPPORT OF THE PETITIONER

INSTITUTE FOR JUSTICE
WILLIAM H. MELLOR
CLINT BOLICK*
RICHARD D. KOMER
1717 Pennsylvania Ave., NW
Suite 200
Washington, DC 20006
(202) 955-1300

**Counsel of Record*

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

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INTEREST OF *AMICI CURIAE*[1]

Amici curiae are individuals and organizations strongly committed to education reform and particularly to expanding parental choice in education. The legal issues raised in the instant case directly implicate *amici*'s individual and institutional concerns.

The Institute for Justice is a nonprofit, public interest law firm committed to defending the essential foundations of a free society and securing greater protection for individual liberty. Toward that end, the Institute for Justice has defended or is presently defending the constitutionality of programs in Arizona, Florida, Illinois, Ohio, and Wisconsin that give parents greater freedom to send their children to the schools of their choice. In addition, the Institute spearheaded legal efforts to expand parental choice programs in Maine and Vermont that exclude religious schools from the choices parents can make. To date, this Court has denied petitions for certiorari in cases involving the Institute for Justice from Arizona,[2] Wisconsin,[3] Maine,[4] and Vermont.[5]

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[1] In conformity with Supreme Court Rule 37, *amici* have obtained the consent of the parties to the filing of this brief, and letters of consent have been filed with the Clerk. *Amici* also state that counsel for a party did not author this brief in whole or in part and that no person or entities other than *amici*, their members, and their counsel made a monetary contribution to the preparation and submission of the brief.

[2] *Kotterman v. Killian*, 972 P.2d 606 (Ariz.), *cert. denied*, 120 S. Ct. 42 (1999).

[3] *Jackson v. Benson*, 578 N.W.2d 602 (Wisc.), *cert. denied*, 525 U.S. 997 (1998).

[4] *Bagley v. Raymond School Dep't*, 728 A.2d 127 (Me.), *cert. denied*, 120 S. Ct. 364 (1999).

[5] *Chittenden Town School Dist. v. Vermont Dep't of Ed.*, 738 A.2d 539 (Vt.), *cert. denied*, 120 S. Ct. 626 (1999).

Vermonters for Better Education, Inc. ("VBE") is a nonprofit organization dedicated to improving educational options for all children in the state of Vermont. Based in Vermont, one of only two states that offers local school districts the option of providing all resident high school students tuition to attend the private or public schools of their choice in lieu of operating district public schools, VBE strongly supports efforts to allow parents to choose religious as well as nonreligious schools for their children's education.

Dr. Blane Nasveschuk is the parent of a son attending Mount St. Joseph's Academy in Rutland, Vermont, one of two Catholic high schools in the state. As a resident of the Rutland Town School District, which opts to pay tuition for its high school students to attend the private or public schools of their choice rather than operate its own public high school, Dr. Nasveschuk is unable to have tuition paid on his son's behalf because of Vermont's exclusion of religious schools from the "tuitioning" program, an exclusion mandated by the Vermont Supreme Court's decision in *Chittenden Town School District v. Vermont Dep't of Education*, 738 A.2d 539, *cert. denied*, 120 S. Ct. 626 (1999).

Cynthia Bagley is a parent of two sons, one of whom attended Cheverus High School in Portland, Maine, one of three Catholic high schools in the state, and the other of whom cannot attend Cheverus for financial reasons. As a resident of Raymond Township, which opts to pay tuition for its high school students to attend the private or public schools of their choice rather than operate its own public high school, Mrs. Bagley was and is unable to have tuition paid on her sons' behalves because of Maine's exclusion of religious schools from the "tuitioning" program, an exclusion upheld by the Maine Supreme Judicial Court in *Bagley v. Raymond School Dep't*, 728 A.2d 127, *cert. denied*, 120 S. Ct. 364 (1999).

INTRODUCTION AND SUMMARY OF ARGUMENT

Like the Title I program that was the subject of this Court's decision in *Agostini v. Felton*, 521 U.S. 203 (1997), and the Chapter 2 program that was the subject of this Court's decision this past term in *Mitchell v. Helms*, 120 S. Ct. 2530 (2000), the Individuals with Disabilities Education Act ("IDEA"),[6] the federal program at issue in this case, provides federal aid to local school districts to administer educational programs targeted to a specific population of individual students, those in need of special educational services. This Court's decision involving the IDEA, *Zobrest v. Catalina Foothills School District*, 509 U.S. 1 (1993), made clear that the Establishment Clause permits IDEA services, such as those at issue in this case, to be delivered by the local school districts on the premises of private religious schools such as the school involved in this case. The decision of the Ninth Circuit below, however, permits the more restrictive state constitution of Oregon to trump the petitioner's free exercise of religion and equal protection rights by denying to petitioner the on-site provision of special education services he would receive if he attended a secular private school.

Amici share with petitioner an interest in seeing this erroneous interpretation of the Free Exercise and Equal Protection Clauses reversed. *Amici* promote, and the individual *amici* would like to participate in, programs that expand the range of educational options available to children, particularly low-income children for whom private education is otherwise financially unavailable. These programs operate through publically-funded tuition and scholarships, as well as tax credits for educational expenses and donations to scholarship funds. To maximize their effectiveness, these programs must include the widest possible variety of educational options. The Vermont Supreme Court's novel interpretation of its state

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[6] 20 U.S.C. §§ 1400-1485 (1998).

constitution's religion provision and erroneous interpretation of the Federal Constitution's free exercise guarantee has left families, like that of *amicus* Nasveschuk, wishing to choose religious schools unable to participate in Vermont's tuitioning program. Similarly, the Maine Supreme Court's erroneous interpretation of the Establishment and Free Exercise Clauses have left families, like that of *amicus* Bagley, similarly unable to participate in Maine's tuitioning program. If erroneous decisions such as these and the case below are permitted to stand, the effectiveness of school choice programs that meet all the prerequisites of the Establishment Clause can be undercut by state supreme courts implementing state constitutional provisions conceived in religious bigotry.

The fundamental flaw in the Ninth Circuit's decision below is that it took the "substantial burden" test from this Court's pre-*Employment Division of Oregon v. Smith*[7] Free Exercise Clause jurisprudence applicable to distinctions facially neutral with respect to religion and applied it to a classification that is *not* religiously-neutral on its face. Because in the case below the discrimination against those selecting a religious school meant that the petitioner, who is blind and suffers from cerebral palsy, "merely" had to be taken down the street to a fire hall to receive the special education services to which he is entitled (and which he would have received on-site had he attended a nonreligious private school), the Court found no Free Exercise or Equal Protection violation, thereby creating a *de minimis* exception for overt discrimination based on religion.

The Ninth Circuit's holding is in direct conflict with an IDEA decision of the Eighth Circuit, *Peter v. Wedl*, 155 F.3d 992 (1998), which held that Minnesota could not deny on-site IDEA services without violating the Free Exercise, Equal Protection, and Free Speech Clauses. The Ninth Circuit's use of the substantial burden test in a

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[7] 494 U.S. 872 (1990).

nonfacially-neutral situation also conflicts with decisions of the Third and Sixth Circuits, *Brown v. Borough of Mahaffey*, 35 F.3d 846 (3d Cir. 1994), and *Hartmann v. Stone*, 68 F.3d 973 (1995), although these cases do not involve the IDEA. The First Circuit, however, in *Strout v. Albanese*, 178 F.3d 57, *cert. denied*, 120 S. Ct. 329 (1999), also has erroneously applied the substantial burden test to a case involving a religious classification on its face.[8] Thus, the circuit courts are split three-to-two on whether to apply the substantial burden test to distinctions that are not religiously-neutral on their face.

In failing to apply the correct test to a facially discriminatory classification, the Ninth Circuit has failed to properly follow this Court's decisions interpreting the Free Exercise Clause that apply strict scrutiny to legislative actions based on religion, *Church of Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520 (1993), and *McDaniel v. Paty*, 435 U.S. 618 (1978). See also *Employment Division of Oregon v. Smith*, 494 U.S. 872 (1990). If permitted to stand, the Ninth Circuit's decision below will undercut the IDEA's religious neutrality, as well as the neutrality of other similar programs like Title I. Moreover, it will continue to permit states to discriminate against those people who make religious choices for the education of their children, under the guise of implementing state constitutional provisions more restrictive than the Establishment Clause but which in actuality infringe on free exercise rights.

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[8] *Strout*, a non-IDEA case, involved the same Maine tuitioning program addressed by the Maine Supreme Judicial Court in *Bagley*.

ARGUMENT

I. THE NINTH CIRCUIT'S DECISION CONFLICTS DIRECTLY WITH THE EIGHTH CIRCUIT'S DECISION IN *PETER v. WEDL.*

A. FREE EXERCISE

Prior to this Court's decision in *Employment Division of Oregon v. Smith*, 494 U.S. 872 (1990), this Court employed a balancing test in evaluating claims that laws of general applicability, religiously-neutral on their face, infringed upon the religious Free Exercise rights of particular individuals. This test asked whether the challenged legal requirement placed a substantial burden on the observation of a central tenet of religious belief or practice. If so, then the governmental action had to be justified by a compelling governmental interest to survive scrutiny. *Sherbert v. Verner*, 374 U.S. 398 (1963). The test essentially balanced the harm to the individual against the interests served by the government's rule or law, and quite naturally applied only where the individual could show that the burden was significant or substantial. The test, however, applied only where the governmental action was religiously neutral; the Court did not apply it to those infrequent cases where a statute on its face was not religiously neutral, such as *McDaniel v. Paty*, 435 U.S. 618 (1978), which addressed Tennessee's disqualification of clergy from service in the state legislature and constitutional conventions.

In *Smith*, this Court jettisoned the substantial burden balancing test for religiously-neutral laws, holding that where such laws have the effect of burdening religiously-motivated activity there is no need to justify them with a compelling governmental interest. *Smith* did not, however, in any way eliminate the strict scrutiny test that applied, and continues to apply, to governmental action that is not religiously-neutral, either on its face or by

intent. This Court's decision in *Church of Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520 (1993), made this clear. Rejecting decisions from the trial court and Eleventh Circuit that were premised on the substantial burden test applicable to religiously-neutral actions, this Court reversed unanimously, finding that the actions of the government were not intended to be religiously neutral, and that strict scrutiny therefore applied.

The Ninth Circuit below misread *Lukumi* and applied the improper substantial burden test, which allowed the Court to determine that requiring KDM to be taken down the street to the fire hall to obtain special education services did not constitute a substantial burden on his right to attend a religious school. Despite its recognition that the regulation in question necessitated treating KDM differently than similarly-situated children in public schools and nonsectarian private schools, and thus was not religiously-neutral, the Court refused to apply *Lukumi* based on its belief that *Lukumi* only applies to situations where government acts with "the object or purpose . . . of suppression of religion or religious conduct." *KDM*, 196 F.3d 1046, 1050 (*quoting Lukumi*, 508 U.S. 520, 533).

The *KDM* Court agreed with the First Circuit's decision in *Strout v. Albanese*, 178 F.3d 57, *cert. denied*, 120 S. Ct. 329 (1999), that *Lukumi* only mandates strict scrutiny where the statute that discriminates against religion on its face is motivated by a substantial animus. While it is clear in *Strout* (and its state court analog *Bagley*) that the exclusion of religious schools from those parents can choose under Maine's tuitioning system occurred due to a mistaken belief that this was necessary to comply with the Establishment Clause, *amici* do not believe that a similar lack of animus can be said to apply to Oregon's

regulation.[9] Moreover, both *Strout* and *KDM* misunderstood this Court's use of the evidence of substantial animus in *Lukumi*: it went to show that the statutes involved were not religiously-neutral, despite arguments to the contrary. In both *Strout* and *KDM*, there is no question that the statutes are religiously neutral. Only children in religious schools cannot receive tuition in *Strout* and on-site IDEA services in *KDM*.[10]

In so (mis)reading *Lukumi*, the Ninth and First Circuits have placed themselves in conflict with the Eighth Circuit's decision in *Peter v. Wedl*, 155 F.3d 992 (1998). *Peter* involved a nearly identical fact pattern, in which a state regulation forbade the provision of IDEA services on the premises of religious schools. Because of the nature of their disabilities, however, the children in *Peter* required full-time services in the classroom, and the state's regulation put them to a harder choice than KDM faced. They had either to forego the services entirely and remain in their religious schools or forego attending their religious schools and receive the services in a non-religious school. The Ninth Circuit seized upon this factual difference and elevated it to a legal distinction by declaring the burden on KDM to be insubstantial. The *Peter* decision, however, is in no way premised on the idea that

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[9] See part II of this Argument, *infra*.

[10] *Amici* emphasize in this regard that it is the line-drawing on the basis of religion that is the problem. If the Minnesota rule in *Peter* and the Oregon rule in *KDM* precluded on-site IDEA services in all private schools, then the line drawn is based on a public-private distinction that does not implicate the First Amendment. Where, however, the line is drawn on a religious basis, or a facially neutral line is chosen because of its effects on the basis of religion (i.e., due to religious animus), then strict scrutiny is required.

the burden placed on the free exercise rights of the plaintiffs there were "substantial" enough to warrant the protection of the First Amendment. See *Peter*, 155 F.3d 992.

While not IDEA cases, the Third and Sixth Circuits have resolved cases consistent with *Peter* and in conflict with *KDM* and *Strout*. In *Brown v. Borough of Mahaffey*, 35 F.3d 846 (1994), a town erected a gate in a town park to eliminate the shortest route to a property used for religious meetings. The Third Circuit refused to apply the substantial burden test used in *KDM* because it recognized that it was developed "to balance the tension between religious rights and valid governmental goals advanced by 'neutral and generally applicable laws' which create an incidental burden on religious exercise." *Brown*, 35 F.3d at 850. Since the burden imposed by the government's action in that case was intentionally based on religion, the burden it imposed was not incidental and strict scrutiny applied. Similarly, in *Hartmann v. Stone*, 68 F.3d 973 (1995), the Sixth Circuit did not use the substantial burden test but rather applied strict scrutiny in invalidating a facially discriminatory Army regulation that forbade day-care providers on an army base from engaging in religious activities. The Court noted that the Army regulation was not religiously-neutral on its face, and that therefore strict scrutiny applied.

B. EQUAL PROTECTION

In *Peter*, the Eighth Circuit held that the Minnesota regulation precluding on-site IDEA services also violated the Equal Protection Clause as a classification based on religion that could not be justified under the *strict scrutiny* standard. In *KDM*, the Ninth Circuit held that the virtually identical Oregon regulation did *not* violate the Equal Protection Clause because the classification was justified under the *rational basis* standard as a legitimate

interpretation of Article I, § 5 of the Oregon Constitution. See *KDM*, 196 F.3d at 1052. One of these Circuits must be wrong; *amici* submit that it is clearly the Ninth.

Despite having clearly found that the Oregon regulation "discriminates" on the basis of religion in its treatment of KDM's Free Exercise claim, *KDM*, 196 F.3d at 1050, in addressing the Equal Protection claim, the *KDM* court identified the classification at issue as being the class of parochial school students and asserted without support that they are not a suspect class and thus only protected by the rational basis test.[11] The court referenced the parties' stipulation that the State of Oregon interprets Article I, § 5 of its constitution to require the provision of special education services in a religiously-neutral setting, and concluded that the regulation rationally furthered the State's legitimate interest in its religious separation requirement, which clearly exceeded any such separation required by the federal Constitution.[12]

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[11] Although the Ninth Circuit directed readers to *City of New Orleans v. Dukes*, 427 U.S. 297 (1976), see *KDM*, 196 F.3d at 1052, that case has nothing to do with religion or parochial school students, although it does state that the unsurprising proposition that classifications based on race, *religion*, and ethnicity are subject to strict scrutiny. See *Dukes*, 427 U.S. at 303.

[12] The Court supported its decision by noting that its holding in *Zobrest v. Catalina Foothills Sch. Dist.*, 963 F.2d 1190 (9th Cir. 1992), that the Free Exercise Clause does not create a fundamental right to on-site IDEA services, is still the law of the Ninth Circuit despite this Court's overruling of *Zobrest*'s Establishment Clause holding. The Court also cited to *Luetkemeyer v. Kaufman*, 364 F. Supp. 376 (W.D. Mo. 1973), *aff'd*, 419 U.S. 888 (1974), holding that there was no equal protection right to transportation to religious schools. *Amici* note that these decisions are inapposite to the issue at hand, and reiterate their view that the Equal Protection Clause only comes into play when the State has already made a decision to include students at private schools within a benefit program. Once it has done so,

The Equal Protection holding of *KDM* both conflicts with another circuit's holding on an identical issue and fails to conform to this Court's application of strict scrutiny of religious classifications. Moreover, this Court has refused to allow more restrictive state constitutional provisions to compromise the Free Exercise Clause in *Widmar v. Vincent*, 454 U.S. 263 (1981), and a similar result must obtain under the Equal Protection Clause.[13]

II. RESTRICTIVE STATE CONSTITUTIONAL PROVISIONS CANNOT BE PERMITTED TO DISCRIMINATE AGAINST PARENTS' CHOICE OF RELIGIOUS SCHOOLS FOR THEIR CHILDREN

The petition filed by K.D.M. provides an otherwise thorough statement of the facts of the case that *amici* wish to supplement in only one area. The parties stipulated that the Oregon Administrative Rule at issue in this case (OR. ADMIN. R. 581-015-0166 (1995)), which states that "special education and related services shall be provided in a religiously-neutral setting," implements the State of Oregon's interpretation of Article I, § 5 of its state constitution.[14] Article I, § 5 reads as follows: "No money shall be drawn from the Treasury for the benefit of any religeous [sic], or theological institution, nor shall any

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it discriminates on the basis of religion to exclude from receiving benefits only those students who have chosen religious schools.

[13] An important reason for a consistent outcome under the two clauses is that many participants in school choice programs choose religious schools for non-religious reasons, but still should have an opportunity to challenge successfully the discriminatory denial of benefits based upon the exclusion of religious schools.

[14] *KDM v. Reedsport School District*, 196 F.3d 1046, 1052 (9th Cir. 1999).

money be appropriated for the payment of any religeous [sic] services in either house of the Legislative Assembly." Thus, while it is clear post-*Zobrest* that neither the federal Establishment Clause nor the IDEA prohibits the provision of the special education services KDM needs on site at his religious school, Oregon interprets its Constitution as forbidding such on-site delivery as the "draw[ing] of money from the Treasury for the benefit of [a] religious . . . institution."

Article I, § 5 is, of course, a precursor of the state Blaine Amendments, which are found in the constitutions of 29 states.[15] Several members of this Court and the Arizona Supreme Court have recently recognized that the Blaine Amendment (and, *amici* would add, its progeny in the state constitutions), requiring the exclusion of pervasively sectarian schools from otherwise permissible aid programs, was a proposal "born of bigotry, [that] should be buried now."[16] The First Amendment

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[15] Joseph P. Viteritti, *Blaine's Wake: School Choice, The First Amendment, and State Constitutional Law*, 21 HARV. J. L. & PUB. POL. 657 (1998).

[16] *Mitchell v. Helms*, 120 S. Ct. 2530, 2551-52 (2000) (plurality op. of Thomas, J. at 30-31). Justice Thomas, joined by Chief Justice Rehnquist and Justices Kennedy and Scalia, noted that:

> Finally, hostility to aid to pervasively sectarian schools has a shameful pedigree that we do not hesitate to disavow. *Cf. Chicago v. Morales*, 527 U.S. 41, 53-54, n. 20 (1999) (plurality opinion). Although the dissent professes concern for "the implied exclusion of the less favored," *post*, at 1, the exclusion of pervasively sectarian schools from government-aid programs is just that, particularly given the history of such exclusion. Opposition to aid to "sectarian" schools acquired prominence in the 1870's with Congress's consideration (and near passage) of the Blaine Amendment, which would have amended the

demands that the state Blaine Amendments be interred with it.[17]

Oregon in particular shares in the "shameful pedigree" of the Blaine Amendments, of which Justice Thomas wrote in *Mitchell v. Helms*.[18] Public schools in the United States arose from the "common school" movement that began in Massachusetts in the early 1800's.[19] As one

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constitution to bar any aid to sectarian institutions. Consideration of the Amendment arose at a time of pervasive hostility to the Catholic Church and to Catholics in general, and it was an open secret that "sectarian" was code for Catholic. See generally Green, The Blaine Amendment Reconsidered, 36 Am. J. Legal Hist. 38 (1992).

In *Kotterman v. Killian*, 972 P.2d 606, 624 (Ariz.), *cert. denied*, 120 S. Ct. 42 (1999), the Arizona Supreme Court concluded that "The Blaine amendment was a clear manifestation of religious bigotry, part of a crusade manufactured by the contemporary Protestant establishment to counter what was perceived as a growing 'Catholic menace.' " (Citations omitted.) Despite the similarity of language between its state Blaine Amendment and the federal original, the Court refused to give its constitutional language a more restrictive interpretation than the Establishment Clause because "we would be hard pressed to divorce the amendment's language from the invidious intent that prompted it." *Id.*

[17] More precisely, what must be buried is the interpretation of the state religion provisions to restrict the participation of religious providers in programs meeting the First and Fourteenth Amendments' command of religious neutrality in parental choice programs.

[18] See note 16, *supra*.

[19] See, e.g., Charles Glenn, Jr., The Myth of the Common School (1988); Lloyd P. Jorgenson, The State and the Non-Public School 1825-1925 (1987).

legal commentator has noted, "The common-school movement promoted a religious orthodoxy of its own that was centered on the teachings of mainstream Protestantism and was intolerant of non-believers."[20] Moreover, "[t]he common school was designed to function as an instrument for the acculturation of immigrant populations, rendering them good productive citizens in the image of the ruling majority."[21] Bible reading was an essential component of the supposedly "nonsectarian" common schools, but only the Protestant King James Bible was allowed.[22]

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[20] Viteritti, *supra* note 15, at 666.

[21] *Id.* at 668.

[22] See, e.g., *Donahoe v. Richards*, 38 Me. 376 (1854), in which the Supreme Judicial Court of Maine upheld the expulsion of a Catholic girl who wanted to read the Catholic Douay Bible and refused to read the Protestant Bible. In the course of its opinion, the Court unforgettably expressed the acculturation rationale for the public schools:

> Large masses of foreign population are among us, weak in the midst of our strength. Mere citizenship is of no avail, unless they imbibe the liberal spirit of our laws and institutions, unless they become citizens in fact as well as in name. In no other way can the process of assimilation be so readily and thoroughly accomplished as through the medium of the public schools, which are alike open to the children of the rich and the poor, of the stranger and the citizen.

38 Me. at 413.

The public schools in Oregon similarly received their impetus from the Protestant clergy.[23] Article I, § 5 of the Oregon Constitution dates from the original 1859 Constitution, and accomplished a primary objective of the Know-Nothing movement of the 1850's – the defunding of any Catholic alternatives to the nondenominational Protestant public schools.[24] Article I, § 5 contains language similar to the Blaine Amendment and was intended to ensure that no aid similar to that going to the nondenominational Protestant public schools went to private religious schools.[25] Oregon, however, ultimately took the public school crusade one step further, when in 1922 Oregon approved an initiative requiring that all children between the ages of eight and sixteen attend

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[23] See David Tyack, *The Kingdom of God and the Common School: Protestant Ministers and the Educational Awakening of the West*, 36 HARV. EDUC. REV. 447 (1966). This case study of Oregon in the mid-1800's shows the role of the clergy in the development of the common schools. See also Jorgenson, *supra* note 19, at 52-54.

[24] Professor Jorgenson has concluded that:

> By the time of the Civil War the School Question, which had been debated so heatedly for two decades, was rapidly moving toward an answer. The decision had been foreshadowed by the position taken by the more militant Protestants in the 1840's. The basic elements of the decision were that public funds were not to be allowed for sectarian schools and that Bible reading in the King James version in the public schools was to be encouraged and, if possible, required.

Jorgenson, *supra* note 19 , at 110.

[25] Although no doubt the great majority of private religious schools were Catholic, even in Oregon the Lutherans and Seventh Day Adventists had their own schools. Jorgenson, *supra* note 19, at 210.

public schools. This initiative was backed by the Ku Klux Klan[26] and the Scottish Rite Masons, and effectively outlawed private schools.[27] Two private schools, one of them religious, sued, resulting in this Court's decision in *Pierce v. Society of Sisters*, 208 U.S. 510 (1925), finding that the law "unreasonably interferes with the liberty of parents and guardians to direct the upbringing and education of children under their control." 208 U.S. at 534-35. This Court declared, "The fundamental theory of liberty upon which all governments in this Union repose excludes any general power of the state to standardize its children by forcing them to accept instruction from public teachers only. The child is not the mere creature of the State; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for further obligations." *Id.* at 535.

This, then, is the historical context behind the language in many state constitutions that seek to exclude aid to religious schools. The statement with which this Court opened its opinion in *Lukumi*, "The principle that government may not enact laws that suppress religious belief or principle is so well understood that few violations are recorded in our opinions," 508 U.S. at 523, while literally correct in stating this Court has rarely found such violations, is perhaps naïve in ignoring the tremendous legacy left in state constitutions by the anti-Catholic bigotry of the Nineteenth Century. Despite this Court's warning in its first Establishment Clause decision of the modern era, *Everson v. Board of Education*, 330 U.S. 1, 18 (1947), that

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[26] It bears remembering that the Ku Klux Klan believed in the inherent inferiority of Catholics and Jews, as well as blacks. See, e.g., David B. Tyack, "The Perils of Pluralism: The Background of the Pierce Case," AMER. HIST. REV. 74, 79-80 (1968).

[27] Jorgenson, *supra* note 19, at 205-15.

"the First Amendment . . . requires the state to be neutral in its relations with groups of religious believers and nonbelievers; it does not require the state to be their adversary. State power is no more to be used to handicap religions, than it is to be used to favor them," and its intimation that it would violate the Free Exercise Clause to have excluded religious school students from the transportation subsidies at issue in that case, many state courts have routinely interpreted their constitutions (as Oregon did here) to deny equal public benefits to people choosing religious schools.

In case after case where this Court has upheld the participation of families or individuals choosing religious options against Establishment Clause challenge, state courts have denied participation under their state constitutions. For example, although this Court approved transportation subsidies in *Everson*, Alaska, Delaware, Hawaii, Idaho, Oklahoma, and Washington deny such subsidies to religious school students.[28] Although this Court approved the provision of textbooks to religious school students as well as all other students in *Board of Education v. Allen*, 392 U.S. 236 (1968), California, Massachusetts, Michigan, Missouri, Nebraska, Oregon, and South Dakota

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[28] G. Alan Tarr, "Church and State in the States," 64 WASH. L. REV. 73, 98-99 note 136 (1989). A number of other state supreme court decisions excluding religious school students from transportation programs were nullified by state constitutional amendments. *Honohan v. Holt*, 17 Ohio Misc. 57, 244 N.E.2d 537 (Ct. Common Pleas 1968), by way of contrast, took *Everson*'s warning seriously, holding that to have excluded parochial school students from transportation subsidies otherwise available to all would violate the Free Exercise Clause.

deny textbooks to religious school students.[29] And after this Court unanimously upheld the right under the Establishment Clause of a college student to use state and federal money to attend a religious college in order to pursue a religious vocation in *Witters v. Washington Dep't of Services for the Blind*, 474 U.S. 481 (1986), the Washington Supreme Court held on remand that the state constitution forbade it in *Witters v. Washington Commission for the Blind*, 771 P.2d 1119, *cert. denied*, 493 U.S. 850 (1989).[30]

Cumulatively, these decisions stand as a massive barrier to the rights of religious people to the free exercise of their religious beliefs and the equal protection of the laws. In each and every instance, the denial of those rights occurs through the enforcement of provisions that address religion on their face and that cannot be characterized as religiously neutral. Moreover, history demonstrates that many, if not most, of the provisions have their origins in the pervasive anti-Catholic bigotry of the 1800's.[31] While this anti-Catholicism has largely waned in

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[29] Tarr, *supra* note 28. As with transportation subsidies, several other state supreme courts that excluded religious school students from textbook programs were overruled by constitutional amendments.

[30] Of course, both *KDM* and *Peter* involve state special education regulations purporting to forbid what this Court upheld under the Establishment Clause, namely, the provision of on-site special education services at religious schools.

[31] The Vermont Supreme Court's reinterpretation of the religion provision of its constitution in *Chittenden*, a provision originally aimed at preventing the then-common practice of government agencies collecting the tithes that church members owed their churches, to forbid the collection of education taxes for use by families selecting a religious school for their children, demonstrates that pre-Blaine Amendment era provisions can also be used as engines for religious discrimination. Of course, at the time it was adopted, the Vermont constitution also limited

the present day, it has been replaced in substantial measure by a secular perspective uncomfortable with and sometimes tacitly hostile to *all* religion and religious expression.[32] *Amici* wholeheartedly endorse the approach of Judge Kleinfeld, dissenting in the case below:

> The Free Exercise Clause prohibits government anticlericalism as vigorously as the Establishment Clause prohibits government from preferring a particular religion. . . . The Establishment Clause and the Free Exercise Clause are not in tension, as though one said people can practice their religion, and the other said "but not in public." The Free Exercise and Establishment Clauses complement one another, both advancing the purpose of freedom of religion. One guarantees individuals the right to freely exercise their religion, the other assures that this free exercise will be unburdened by government preference for a different religion. Americans are entitled to a government that does not discriminate against them because of their religion, even with burdens that those who do not bear them see as merely a slight inconvenience.

KDM, 196 F.3d at 1057 (J. Kleinfeld, dissenting) (footnote omitted).

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its protections to members of the "Protestant" religion, and excluded Catholics from public office.

[32] Unfortunately, this Court's efforts to rid the public schools of their lingering religious biases and activities under the First Amendment's command of religious neutrality are often misunderstood to mean that it is permissible to burden religious exercise in the interests of ensuring separation of church and state.

CONCLUSION

The decision below is inconsistent with this Court's relevant precedents and with other circuit court decisions that correctly apply those precedents. The Ninth Circuit has mistakenly joined the First in applying a balancing test to a free exercise of religion question involving a regulation that is on its face not religiously neutral, and has mistakenly applied rational basis scrutiny to an equal protection claim involving on its face the suspect category of religion. Moreover, in finding a rational basis for discrimination based on religion, the Ninth Circuit has permitted a state constitutional provision's interpretation to serve as a legitimate state interest, despite that interpretation's result of religious discrimination. If parental choice programs are to reach their full potential as engines for educational reform and greater educational opportunities for all, the erroneous approaches of the Ninth Circuit must be overruled. Accordingly, *amici* urge this Court to grant KDM's petition for certiorari.

Respectfully submitted,

WILLIAM H. MELLOR
CLINK BOLICK*
RICHARD D. KOMER
Institute for Justice
1717 Pennsylvania Ave., N.W.
Washington, D.C. 20006
(202) 955-1300
**Counsel of Record*

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No. 00-131

In The

Supreme Court of the United States

K.D.M., a minor, by and through his father and next friend, W.J.M.,

Petitioner,

v.

REEDSPORT SCHOOL DISTRICT and NORMA PAULUS, in her official capacity as Oregon Superintendent of Public Instruction,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

REEDSPORT SCHOOL DISTRICT'S RESPONSE TO PETITION FOR WRIT OF CERTIORARI

BRUCE A. ZAGAR
Attorney at Law
GARRETT, HEMANN, ROBERTSON, JENNINGS, COMSTOCK & TRETHEWY, P.C.
1011 Commercial Street S.E.
P.O. Box 749
Salem OR 97308-0749
(503) 581-1501

Attorney of Record for Respondent Reedsport School District

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
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RESPONSE TO PETITION FOR WRIT OF CERTIORARI

I. STATEMENT OF THE CASE

Respondent Reedsport School District accepts the petitioner's statement of the Parties to the Proceedings, the Opinions Below, and the Jurisdiction of this court.

Except as set forth below and as identified in the Response Brief of Respondent Norma Paulus, Respondent Reedsport School District accepts the petitioner's Statement of Case. Respondent specifically disagrees that the record supports that, Reedsport School District's policy and practice is to "provide on-site special education services to children with disabilities attending public schools and *non-religious* private schools, but withholds such services from children with disabilities attending *religious* private schools." *Petitioner's Brief at p. 5 (citations omitted)*. Petitioner was provided services but not on-site. OAR 581-015-0166(3) prohibits special education services from being provided except in a religiously-neutral setting. It is the "policy and practice" of Reedsport School District to follow the rules promulgated by the State of Oregon Department of Education relating to delivery of services and the rule in question was followed in the case of K.D.M.

II. SUMMARY OF ARGUMENT

Respondent Reedsport School District further adopts and incorporates by reference the Response to the Petition for Writ of Certiorari of Respondent Norma Paulus.

CONCLUSION

For the reasons stated above and in the Response to the Petition for Review filed by Respondent Norma Paulus, Respondent Reedsport School District requests that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

BRUCE A. ZAGAR
Attorney at Law
GARRETT, HEMANN, ROBERTSON, JENNINGS, COMSTOCK & TRETHEWY, P.C.
1011 Commercial Street S.E.
P.O. Box 749
Salem OR 97308-0749
(503) 581-1501
Attorney for Respondent Reedsport School District

Supreme Court, U.S.
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CLERK

No. 00-131

In the Supreme Court of the United States

OCTOBER TERM, 2000

K.D.M., a minor, by and through his father and next friend, W.J.M.,

Petitioner,

v.

Reedsport School District and Stan Bunn, in his official capacity as Oregon Superintendent of Public Instruction,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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RESPONSE TO PETITION FOR WRIT OF CERTIORARI

HARDY MYERS
Attorney General of Oregon
DAVID SCHUMAN
Deputy Attorney General
***MICHAEL D. REYNOLDS**
Solicitor General
ROBERT M. ATKINSON
JANET A. METCALF
Assistant Attorneys General
400 Justice Building
Salem, Oregon 97310
Phone: (503) 378-4402
Counsel for Respondent

*Counsel of Record

3108

QUESTIONS PRESENTED

1. Whether the Court should deny the petition when the record does not support a key assumption that underlies both the petition and the Court of Appeal's dissent—*viz.*, that, as a general matter, the State and local school districts provide special education services on site to students at private secular schools.

2. Whether the Court should deny the petition when, contrary to the view of petitioner and the dissent, the Ninth Circuit's opinion is narrow in scope and expressly limited by its facts to situations, such as the one presented here, in which petitioner has failed to demonstrate that any burden has been placed on his free exercise of religion, and when petitioner and the dissent also exaggerate the extent of the possible conflict between the circuits—a conflict that largely disappears when the facts of the cases are considered.

3. Whether the Court should deny the petition when the state Board of Education is in the process of repealing the portion of the administrative rule that petitioner challenges, and the case, therefore, will soon be moot.

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STATEMENT OF THE CASE

As explained below in the discussion of the first reason why this petition should be denied, a key assertion made in petitioner's statement of the case—*viz.*, that the Reedsport School District's (District's) practice and policy is to provide on-site special education services to students at private secular schools, while denying those services to children at religious schools—is not supported by the record or the applicable law. In addition, petitioner's statement of the case is argumentative. The following statement of the facts is taken from the majority opinion in the Ninth Circuit, which in turn is based on the stipulated facts.

> While attending public school, KDM received from the District the services of a vision specialist, physical therapy and special equipment at his school. Motivated by sincerely-held religious beliefs, KDM's parents transferred him to Harbor Baptist Church School ("Harbor Baptist"), a sectarian school. After the transfer, the District continued to supply him with special equipment (braillers, computers and other special equipment) at his new school. However, viewing the Harbor School setting as not religiously-neutral, it no longer supplied the vision specialist at the school. Instead, it provided that service at a fire hall down the street from Harbor Baptist. The adequacy of the service is not in dispute nor is it disputed that it is safe for KDM to travel to and from the fire hall, transportation being provided by the District.[1] The service is provided for approximately ninety minutes twice a week. If this service were provided at Harbor Baptist, it

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[1] Petitioner's contention that KDM is forced to "take a painful walk out of his religious school * * * to travel several blocks to a fire hall" is not supported by the record or the stipulated facts. (Pet 13).

> would be provided in a room separate from the classroom because providing it in class could be disruptive to the instruction both of KDM and the other students in the classroom.

(Pet, App B, 6a–7a). Thus, even if Harbor Baptist were a private, non-religious school, and even if the District chose to provide services at the private school, the services nevertheless would be provided outside KDM's regular classroom, just as they are now.

REASONS WHY THE PETITION SHOULD BE DENIED

I. Both petitioner and the Court of Appeal's dissent rely on the erroneous assumption that the State generally provides special education services on site at secular private schools.

Both petitioner and the Ninth Circuit dissenters insist that the State and the District generally provide special education services on site at non-religious private schools. Petitioner asserts that the District's practice and policy "is to provide on-site special education services to children with disabilities attending public schools and *non-religious* private schools, but withhold such services from children with disabilities attending *religious* schools." (Pet 5; emphasis in original). Petitioner also contends that the receipt of "on-site special education services" is "a benefit generally available to a disabled student under Oregon law[.]" (Pet 20). In arguing why the questions presented are of national importance, petitioner again asserts that the benefits at issue here "would be available [under Oregon law] on-site to a child in a non-religious private school." (Pet 21).

The Court of Appeal's dissent in based on the same assumption as the one made by petitioner. The dissent emphatically insists that Oregon has "decided to provide [special edu-

cation] services in private schools" and that, in Oregon, "[h]andicapped children at secular private schools get special education in their schools[.]" (Pet, App B, 16a, 17a). The dissent also contends that "[u]nder Oregon's regulation, if a blind child with cerebral palsy goes to a secular private school, he gets special education in his school," and that the state provides special education services "generally to all children in their public or private schools." (Pet, App B, 20a, 22a).

However, petitioner's and the dissent's repeated assertion that the District specifically and school districts in the State generally provide special education services on site at private non-sectarian schools is not supported by the record in this case or by the applicable law. As a factual matter, the record does not support petitioner's and the dissent's claim that the practice and policy of the District specifically or of Oregon school districts generally is to provide on-site special education services at private non-religious schools.[2] Instead, as the Ninth Circuit majority found, "[t]he record does not disclose whether Reedsport or other school districts provide services at nonsectarian private schools," although admittedly the rule "does not preclude them from doing so." (Pet, App B, 7a n 2). Petitioner does not dispute that finding.

Moreover, it is not reasonable to assume that, absent the "religiously-neutral setting" requirement, school districts generally would provide special education services on site at pri-

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[2] In support of the assertion, petitioner cites only the District Court's order observing that the state administrative rule "has the effect of *allowing* in-class services to disabled students at non-religious schools while prohibiting in-class services to disabled students at religious schools, both public and private." (Pet, App C, 33a; emphasis added). Although the rule may *allow* the provision of on-site services at secular private schools, the record does not demonstrate that such services are in fact provided on site at any such school.

vate schools. A number of factors might enter into a school district's discretionary choice of whether to provide services on site, such as: cost, the number of students involved, the number of private schools involved, the distance between them, proximity to a public school, whether the services could be provided in a group setting or are necessarily one-on-one in nature, and the facilities available at a particular private school. An evaluation of those factors would not necessarily lead a school district to decide to provide on-site services. Thus, as a matter of fact, petitioner's and the dissent's assertion that special education services generally are provided on site at private, non-religious schools is not supported.

As a legal matter, the provision of on-site services also is not required. Under a portion of the Board's rule that is not challenged in this case, a disabled child does not have a right to be provided with on-site services at *any* private school. That portion of the rule provides that if a child with a disability "is offered a free appropriate public education by the child's resident school district and the parent of the child unilaterally enrolls the child in a private school," the child has no "individual entitlement to receive special education and related services from the child's resident school district." OAR 581-015-0166(2) (Pet, App F, 53a). Instead, the question of whether services should be provided at all, and if so, how and where, is left to the school district's sole discretion: in such situations, the district "shall determine which children with disabilities shall receive services, what services shall be provided and how those services shall be provided, *including the location for the delivery of those services*." OAR 581-015-0166(2) (Pet, App F, 53a; emphasis added).[3]

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[3] Petitioner argued below that he had a statutory right to the provision of on-site services, but both the District Court and the Ninth Circuit rejected his statutory claim, which he does not renew in his petition.

Because the unchallenged portion of the state administrative rule makes it clear that no child has a right to on-site services at any private school, when the District Court upheld petitioner's constitutional challenges to the disputed "religiously-neutral setting" provision, the court nevertheless did not order that KDM or any other student was entitled to on-site services at a private school. Instead, the court simply ordered that the District could not rely on the "religiously neutral" requirement to deny on-site services. The District retained discretion as to whether to provide such services at all, and, if so, how and where to provide them. In sum, striking down the "religiously-neutral setting" provision does not entitle any child to on-site services at a private school or lead inexorably to the conclusion that such services will be provided on site.

Admittedly, under the disputed portion of the state rule, special education benefits are not available on site except in a religiously-neutral setting. However, it does not follow and, as noted, the record does not establish that benefits therefore are available and provided on site at private, non-sectarian schools. On the contrary, the unchallenged portion of the rule clearly states that no child at any private school has the right to receive benefits at all, and that whether and, if so, how and where such benefits are provided, is instead a matter entrusted to the discretion of the individual school district. Thus, petitioner's argument, and the difference in treatment of which petitioner complains, are based on an incorrect assumption: *viz.*, that students in private non-sectarian schools receive on-site services, while those in religious schools do not. Because that assumption, which is reiterated throughout the Ninth Circuit dissent and the petition, appears to underlie much of the dissent's and the petitioner's analysis, and the assumption is at odds with the text of the unchallenged portion of the state's

rule and is not supported by the record, this court should deny the petition.

II. Petitioner and the Ninth Circuit dissent exaggerate both the sweep of the majority's opinion and the possible disagreement amongst the circuits.

Petitioner, and the dissent in the Ninth Circuit, seek to portray the majority's decision as one sweeping in its scope. Both petitioner and the dissent also suggest that the circuits are split and that this Court, therefore, should grant the petition.[4] Both of those claims are exaggerated.

First, the Ninth Circuit majority stressed that its decision was based on, and limited to, the facts of this case. The majority emphasized that:

> *The narrow question before us* is whether the free exercise rights of KDM and his parents were impermissibly burdened by the application of Oregon's regulation, which precludes the District from providing special education services to KDM at the sectarian school he attended. In deciding that question *we are guided by the distinction the Supreme Court has recognized in the Establishment Clause context between a statute's invalidity on its face and its invalidity in particular applications. See Bowen v. Kendrik,* 487 U.S. 589, 602 (1988); *see also Hunt v. McNair*, 413 U.S. 734, 742 (1973) (examining only "the transaction presently before [the court]" and not the statute as a whole"); *Zobrest v. Catalina Foothills Sch. Dist.*, 963 F.2d 1190, 1194 n. 3 (9th Cir. 1992) (considering

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[4] Petitioner asserts that "the failure of lower courts to reach consistent conclusions regarding the constitutionality of structurally similar educational benefit programs impedes parents' free exercise of their religious education choices for their children[.]" (Pet 21).

> "only the validity of one very specific proposed application of the statutes at issue"); *rev'd on other grounds,* 509 U.S. 1 (1993). *Whatever the impact of the [Oregon] regulation might be in other factually distinct situations, cf. Zobrest,* 963 F.2d at 1192 (failure to provide a sign-language interpreter in the classroom for plaintiff effectively forced his parents to choose between foregoing a sectarian education or paying for the cost of the interpreter themselves) and *Peter v. Wedl,* 155 F.3d 992 (8th Cir. 1998) (failure to provide a spastic quadriplegic student with needed fulltime paraprofessional while in school forced choice between forgoing sectarian education or paying for the paraprofessional), *this is not a case in which the regulation impinges on plaintiffs' free exercise rights.*

(Pet, App B, 9a–10a; emphasis added).

Having stressed that it was dealing with an as-applied challenge and that its decision, therefore, was limited to the facts of this case, the majority then turned to those facts.

> The parties stipulated that the service provided to KDM at the fire hall down the street from the school twice a week for ninety minutes is in compliance with KDM's statutory individualized education plan, the adequacy of which is not in dispute, and that he could safely travel there—indeed, the vision specialist comes to KDM's school, picks him up and them returns him to his school. Moreover, plaintiffs have stipulated that the vision specialist's services would not be provided in-class at Harbor Baptist but in a separate room. Thus, there is no support for the district court's finding that the regulation forces KDM and his parents to choose between enrolling at Harbor Baptist

> and receiving special education at the fire hall or enrolling at a nonreligious school and receiving in-class services. In sum, there is no showing that application of the regulation to KDM's case burdens KDM's or his parents' free exercise of their religion.

(Pet, App B, 10a). Thus, the majority held only that, in this case where no burden was shown, petitioner had not sustained his free exercise claim. That conclusion was derived from the facts of this case, which include: petitioner's agreement that KDM's individualized education plan is adequate, that traveling to the fire hall is safe, and that, even if the vision specialist's services were provided at Harbor Baptist, they would not be provided in KDM's regular classroom, but instead in a separate room. The majority's decision is not a broad or sweeping one, but is instead fact-bound, case-specific, and limited.

As noted, petitioner and the dissent in the Ninth Circuit also suggest that the circuits have reached disparate results and have failed "to reach consistent conclusions regarding the constitutionality of structurally similar educational benefit programs[.]" (Pet 21). For that proposition, petitioner and the dissent cite *Strout v. Albanese,* 178 F.3d 57 (1st Cir. 1999), *cert. denied*, 120 S.Ct. 329 (1999), as being consistent with *KDM*, and decisions from the Third, Sixth and Eighth Circuits as being inconsistent with the Ninth Circuit's decision in this case. *Brown v. Borough of Mahaffey, Pa.*, 35 F.3d 846 (3d Cir. 1994); *Hartmann v. Stone*, 68 F.3d 973 (6th Cir. 1995); *Peter v. Wedl*, 155 F.3d 992 (8th Cir. 1998).

An examination of those decisions, admittedly, may reveal some analytical tension between them. *Compare, e.g., Strout*, 178 F.3d at 63 (holding, in a case involving a challenge to a state statute providing that the state will pay for some private school education "provided the institutions are

'non-sectarian' in nature," that the question is "whether government has placed a substantial burden on the observation of a central [religious] belief or practice;" internal quotation marks and emphasis omitted); with *Hartmann*, 68 F.3d at 979 n. 3 ("substantial burden" test is "designed to judge [only] those situations in which a neutral and generally applicable regulation imposes an indirect, albeit substantial, burden on the practice of religion"). On closer examination, however, the differing results and the apparent analytical tension appear to be largely a result of radically differing fact patterns. Certainly nothing in the Ninth Circuit's opinion suggests that the results in these cases would be different were the cases analyzed under the framework the court utilized in this case.

In *Peter v. Wedl*—the case on which petitioner principally relies for his claim that there is a circuit conflict (Pet 11-13)—the state school district refused to provide the services of a full-time paraprofessional to a "severely disabled child" at the child's religious school even though the child required such assistance in order to be able "to function in a school classroom." 155 F.3d at 994. The school district's refusal was based on a state statute allowing the provision of special education services only at a "neutral site," which was defined to include "a nonsectarian private school." *Id.*

In contrast to this case, where the burden imposed by the state's rule is at most *de minimis*, the burden imposed in *Peter* was substantial. The full-time paraprofessional cost about $10,000 per year and, ultimately, the child's parents were forced to choose between placing their son at a sectarian school and providing him with the assistance he needed to attend school at all. *Id.* at 994. Moreover, the record demonstrated that the district in fact provided assistance to students at nonsectarian private schools—a showing not made in this case. *Id.* at 997

Hartmann v. Stone dealt with an Army regulation prohibiting on-base day-care providers "from having any religious practices, such as saying grace or reading Bible stories, during their day-care program." 68 F.3d at 975. One of the plaintiffs had been a day-care provider under the Army program "until she discovered Army regulations prohibited her from providing any religious activities for her children or those children whose parents had requested such activities." *Id.* The other plaintiffs were active duty Army personnel or their spouses who had been forced to choose between obedience to the Army regulations and selecting the child care they wanted. Again, in contrast to the at most *de minimis* burden shown here, the burden in *Hartmann* was substantial, and the Army in fact treated day-care providers who included some religious practices differently from those who did not.

Brown v. Borough of Mahaffey, Pa., also is strikingly dissimilar to this case. There, in the midst of a situation marked by extreme animosity toward the plaintiff, a Pentecostal minister conducting revival meetings, the borough repeatedly locked a gate giving access to the site where the revival meetings were to be held. 35 F.3d at 848–49. Both the impact and the religious animus shown in that case are unlike anything disclosed in this record, where the Ninth Circuit majority noted that "the District's solicitousness in accommodating KDM could hardly be said to reflect a purpose to 'suppress[] religion or religious conduct.'" (Pet, App B, 11a).

Similarly, both *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993), and *McDaniel v. Paty*, 435 U.S. 618 (1978)—both relied on by petitioner and said to be contrary to the Ninth Circuit's decision in this case—involve notably different facts. In *Lukumi*, regulations that were ostensibly facially neutral were in fact "targeted" against a central religious practice of the Santeria religion—animal sacrifice. This Court held that "[t]he Free Exercise Clause pro-

tects against governmental hostility which is masked as well as overt." 508 U.S. at 534. In *McDaniel v. Paty*, state law forbade a minister from serving as a delegate to the state's limited constitutional convention. 435 U.S. at 620. The minister was forced to choose between his vocation and his desire to exercise his political rights "because the State ha[d] conditioned the exercise of one on the surrender of the other." *Id.* at 626.

In sum, in *Lukumi* and in *McDaniel*, as in the circuit court cases on which petitioner relies, substantial burdens were imposed by the challenged laws. Therefore, the suggestions in some of those circuit court cases that the substantial burden test does not or should not apply are mere *dicta*. *See, e.g., Hartmann*, 68 F.3d at 979 n. 3. But most importantly, nothing in the Ninth Circuit opinion suggests that those cases would come out differently under the majority's analysis in this case. Thus, when viewed in the light of their facts, the cases petitioner cites are readily reconcilable. In those cases where a substantial burden was created, a free exercise violation was found. *See Peter v. Wedl; Hartmann; Brown.* In contrast, in this case no burden, other than perhaps a *de minimis* one, is present. Petitioner has pointed to no case, and the state is aware of none, where no burden, or at most a *de minimis* one, has been held to amount to a free exercise violation. Simply put, the circuit conflict petitioner identifies is more apparent than real. Because the Ninth Circuit's decision is carefully and explicitly limited to its facts, and because the cases can be reconciled in light of the facts on which they appear to depend, this Court should deny the petition.

III. This case will soon be moot.

As noted in the questions presented, the state Board is in the process of repealing the portion of its administrative rule that is at issue here. Petitioner's attack is aimed at the subsec-

tion of the rule that states that special education and related services "shall be provided in a religiously-neutral setting." OAR 581-015-0166(3) (Pet, App F, 53a). The state Board intends to repeal that portion of the rule. Appended to this brief is the proposed rule amendment, which would delete that portion of the rule. (App B, App-11). A hearing on the proposed rule amendment is scheduled for October 24, 2000. (App B, App-7). The Board next meets on December 7, 2000, and the rule amendment should become final and effective soon after that meeting.

In light of the impending rule repeal, this case is on the verge of becoming moot. The repeal of the provision that is at issue here would moot this case.

> It has long been settled that a federal court has no authority "to give opinions upon moot questions or abstract propositions, or to declare principles or rules of law which cannot affect the matter in issue in the case before it." *Mills v. Green*, 159 U.S. 651, 653 (1895). *See also Preiser v. Newkirk*, 422 U.S. 395, 401 (1975); *North Carolina v. Rice*, 404 U.S. 244, 246 (1971). For that reason, if an event occurs while a case is pending on appeal that makes it impossible for the court to grant "any effectual relief whatever" to a prevailing party, the appeal must be dismissed. *Mills*, 159 U.S. at 653.

Church of Scientology v. United States, 506 U.S. 9, 12 (1992). For that reason, this Court should deny the petition. The issues presented soon will be hypothetical, and the Court "does not sit to decide hypothetical issues or to give advisory opinions about issues as to which there are not adverse parties before" the Court. *Princeton University v. Schmid*, 455 U.S. 100, 102 (1982) (citations omitted).

Moreover, the state Board will have little incentive to defend a rule that it no longer believes is necessary or desirable.

> Constitutional adjudication being a matter of "great gravity and delicacy," *see Ashwander v. TVA*, 297 U.S. 288, 345 (1936) (Brandeis, J., concurring), we base our refusal to pass on the merits on "the policy rules often invoked by this Court 'to avoid passing prematurely on constitutional questions. * * *'"

Kremens v. Bartley, 431 U.S. 119, 128 (1977), quoting *Franks v. Bowman Transportation Co.*, 424 U.S. 747, 756 n 8 (1976). Because, with the amendment of the rule, no actual, live controversy will be presented here, this Court should avoid passing prematurely on the constitutional questions presented. *Kremens*, 431 U.S. at 129 (passage of new statute "clearly moots" claims presented). *See also Department of Treasury v. Galioto*, 477 U.S. 556, 559–60 (1986) (same).[5]

Admittedly, in some rare cases this Court has considered the validity of legal provisions despite their subsequent repeal, invoking "the 'well-settled' rule that 'a defendant's voluntary cessation of a challenged practice does not deprive a federal court of its power to determine the legality of the practice.'" *Fla. Gen. Contractors v. Jacksonville*, 508 U.S.

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[5] Although claims about the validity of a statute or rule can be mooted by the enactment of new provisions, a case nevertheless may not be moot if a claim for damages is presented. *See Richmond v. Crosen Co.*, 488 U.S. 469, 478 n 1 (1989) (so holding); *Memphis Light, Gas & Water Div. v. Craft*, 436 U.S. 1, 8 (1978) (same). That exception does not apply here. In his complaint, petitioner sought an award of damages, but that request was based solely on his claim brought under 42 U.S.C. § 1983. The District Court ruled against that claim "[b]ecause there [was] no evidence that [the superintendent] intentionally or recklessly violated plaintiff's clearly established constitutional rights," (Pet, App C, 34a), and petitioner has never renewed the claim or challenged the District Court's ruling. Aside from that claim for damages, petitioner has sought only prospective relief.

656, 662 (1993), quoting *City of Mesquite v. Aladdin's Castle, Inc.*, 455 U.S. 283, 289 (1982). In those cases, the Court has observed that "the defendant's 'repeal of the objectionable language would not preclude it from re-enacting precisely the same provision if the District Court's judgment were vacated.'" *Id.* The Court appears to have considered the validity of subsequently repealed laws, however, only when it had some reason, grounded in the record, to suspect that the "objectionable language" would be reenacted if the case were dismissed. In *City of Mesquite*, for example, the city "ha[d] announced just such an intention." 455 U.S. at 289.

Here, in contrast, the State has asserted that it intends to repeal the disputed rule and not to enact any similar provision in its place. The state Board's "statement of need" for the proposed rule amendment explains that, although the rule "was adopted in the belief that the state and federal law required this provision," "[r]ecent legal opinions have called this position into question" and the current understanding "is that this provision is no longer constitutionally required." (App B, App-9). *See, e.g., Agostini v. Felton*, 521 U.S. 203 (1997) (placing public school teachers in parochial schools does not violate the First Amendment). Absent a constitutional mandate for the rule, the Board "does not believe that other policy reasons support the continuation of this rule[.]" (App B, App-9). This Court has no reason to suspect or to disregard the State's good faith assertion that it intends to repeal the portion of the rule in dispute and not to enact any similar provision in its place.

In sum, because of the imminent repeal of the rule provision challenged here, this case will soon be moot. Therefore, this Court should deny the petition.

CONCLUSION

For the reasons stated above, the petition for certiorari should be denied.

Respectfully submitted,

HARDY MYERS
Attorney General of Oregon
DAVID SCHUMAN
Deputy Attorney General
MICHAEL D. REYNOLDS
Solicitor General
ROBERT M. ATKINSON
JANET A. METCALF
Assistant Attorneys General
Counsel for Respondent
Stan Bunn, in his official capacity as Oregon Superintendent of Public Instruction

October 12, 2000

APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

K.D.M., A Minor, by and Through His Father and Next Friend, W.J.M., Plaintiff, v. REEDSPORT SCHOOL DISTRICT and NORMA PAULUS, in Her Official Capacity as Oregon Superintendent of Public Instruction, Defendants.	Civil No. 96-6075-HO STIPULATED FACTS

The parties stipulate that, for purposes of this action, the following statements are true:

1. Plaintiff resides at 563 Elm Avenue in the city of Reedsport, County of Douglas, State of Oregon. Plaintiff's child resides with the Plaintiff at the same address.

2. Defendant Reedsport School District ("District"), a political subdivision of the State of Oregon, is a public school district that receives federal assistance under 20 U.S.C. §§ 1400, *et seq.* The District's principal place of business is at 100 Ranch Road in the City of Reedsport, County of Douglas, State of Oregon.

3. Defendant Norma Paulus is Oregon's Superintendent of Public Instruction ("Superintendent"). Her principal place of

business is at 255 Capitol Street, N.E., in the City of Salem, County of Marion, State of Oregon.

4. Plaintiff's child is legally blind and has cerebral palsy. As such he falls within the meaning of the term "children with disabilities" as defined in the Individuals With Disabilities Education Act ("IDEA"), 20 U.S.C. § 1401(a).

5. Plaintiff's child is entitled to receive assistance from the State of Oregon on the basis of his disability under the IDEA, and has received such assistance by means of a vision specialist, physical therapy, and other special equipment. He has received such assistance through the District by way of contractual relationships with the Coos Education Service District since he was approximately one year of age. He received such services at Highland Elementary School, a public school he attended prior to attending Harbor Baptist Church School.

6. The District has not provided a vision specialist to Plaintiff's child in his classroom since he began attending the Harbor Baptist Church School in Winchester Bay, Oregon, in 1993, because the Harbor Baptist Church School is a sectarian religious school. Prior to attending Harbor Baptist Church School, K.D.M. received such assistance in his school.

7. The District has continued to supply Plaintiff's child with a vision specialist and those services have been provided at the fire hall in Winchester Bay, Oregon, down the street from the Harbor Baptist Church School, and the District has continued to supply him with braillers, computers, and other special equipment at his school. Plaintiff's child received assistance at the fire hall for approximately 90 minutes, twice per week. These services by the District are in compliance

with the individualized education plan for Plaintiff's child, the adequacy of which is not in dispute. It is safe for plaintiff's child to travel to and from the fire hall with the supervision currently provided.

8. Plaintiff and his wife enrolled this child in the Harbor Baptist Church School based upon sincerely-held religious conviction and beliefs.

9. The vision specialist could provide services to Plaintiff's child in his regular classes, but such an arrangement could prove disruptive to the instruction of Plaintiff's child and the other students in the classroom. Plaintiff would agree to the provision of services in a separate room at Harbor Baptist Church School.

10. The State of Oregon interprets Article I, § 5, of its constitution to require the provision of special education and related services in a religiously-neutral setting.

11. On May 25, 1995, the State Board of Education filed a new rule with the Secretary of State, OAR 581-15-166, which states:

> "Public Educational Agency Responsibility for Children Placed by Parents in Private Schools
>
> (1) If a child with a disability, who is three through the age of eligibility for kindergarten, is offered a free and appropriate public education by the Department of Education and the parent of the child unilaterally enrolls the child in a private school, the child shall not have an individual entitlement to receive special education and related services from the Department of Education. Consistent with the procedures set forth in OAR 581-15-171, the Department of Education shall

determine which children with disabilities shall receive services, what services shall be provided and how those services shall be provided, including the location for delivery of those services.

(2) If a child with a disability, who is at the age of eligibility for kindergarten through age 21, is offered a free appropriate public education by the child's resident school district and the parent of the child unilaterally enrolls the child in a private school, the child shall not have an individual entitlement to receive special education and related services from the child's resident school district. Consistent with the procedures set forth in OAR 581-15-171, resident school districts shall determine which children with disabilities shall receive services, what services shall be provided and how those services shall be provided, including the location for the delivery of those services.

(3) Such special education and related services shall be provided in a religiously-neutral setting.

(4) The Department of Education and school districts shall provide such children with genuine opportunities for equitable participation in special education consistent with the number of children and their needs."

12. The District is not providing the services of a vision specialist to plaintiff's child at the Harbor Baptist Church School because the School District and the State of Oregon believe the setting is not religiously-neutral.

13. Pursuant to with [*sic*] 20 U.S.C. § 1415(b) and ORS § 343.165, the Superintendent appointed a Hearing Officer to determine whether Reedsport must provide a vision specialist for plaintiff's child in his classroom. A copy of the Hearing

Officer's Order, which became final and was mailed to the plaintiff and District November 20, 1995, is attached at [*sic*] Exhibit 1.[1]

/s Gregory A. Chaimov
Assistant Attorney General
Of Attorneys for Defendant
State of Oregon

Date: 28 July 97

not /s David C. Gibbs, Jr.

Date: [not dated]

/s Joseph D. Robertson
Of Attorneys for Defendant
Reedsport School District

Date: July 28, 1997

/s Harold B. Scoggins, III,
OSB #91421
Of Attorneys for Plaintiff

Date: 8-8-97

[1] The Hearing Officer's Order is printed as Appendix D of the Petition for Writ of Certiorari.

APPENDIX B

Secretary of State

NOTICE OF PROPOSED RULEMAKING HEARDING*

A Statement of Need and Fiscal Impact accompanies this form

BOARD OF EDUCATION — 581
Agency and Division — Administrative Rules Chapter Number

Rona Hodges — (503) 373-0840 ext. 467
Rules Coordinator

255 Capitol St NE, Salem, OR 97310-0203
Address

10/24/00	3:00–5:00	PSB 2nd Floor, Rm. 251A	Michael V. Reed
Hearing Date	Time	Location	Hearings Officer

Are auxiliary aids for persons with disabilities available upon advance request? Yes No

RULEMAKING ACTION

ADOPT:
Secure approval of rule numbers with the Administrative Rules Unit prior to filing.

AMEND:
581-015-0166

REPEAL:

Renumber: Secure approval of rule numbers with the Administrative Rules Unit prior to filing.

Amend and Renumber: Secure approval of rule numbers with the Administrative Rules Unit prior to filing.

ORS 343.041, 343.055
Statute Authority: ORS

34 CFR 300.450 to 462, and specifically 34 CFR 300.456
Other Authority

ORS 343.155
Statutes Implemented: ORS

RULE SUMMARY

Public Agency Responsibility for Private School Children with Disabilities and Limitation on Services

For questions regarding this rule please contact Suzy Harris at (503) 378-3573. For a copy of this rule please contact Rona Hodges at the same number or by e-mail: rona.hodges@state.or.us

October 24, 2000	/s C. Gregory McMurdo 9/14/2000
Last Day for Public Comment	Authorized Signer and Date

The *Oregon Bulletin* is published on the 1st of each month and updates the rule text found in the Oregon Administrative Rules Compilation. Notice forms must be submitted to the Administrative Rules Unit, Oregon State Archives, 800 Summer Street NE Salem, Oregon 97310 by 5:00 pm on the 15th of the preceding month unless this deadline falls on a Saturday, Sunday or legal holiday when Notice forms are accepted until 5:00 pm on the preceding workday.

ARC920-1997

Secretary of State

STATEMENT OF NEED AND FISCAL IMPACT

A Notice of Proposed Rulemaking Hearing or a Notice of Proposed Rulemaking accompanies this form.

BOARD OF EDUCATION — 58100

Agency and Division — Administrative Rules Chapter Number

In the Matter of the Amendment of OAR 581-015-0166, Public Agency Responsibility for Private School Children with Disabilities and Limitation on Services	))))))	Statutory Authority, Statutes Implemented, Statement of Need, Principal Documents Relied Upon Statement of Fiscal Impact

Statutory Authority: ORS 343.041, 343.055

Other Authority: 34 CFR 300.450 to 462, and specifically 34 CFR 300.456

Statutes Implemented: ORS 343.155

Need for the Rule(s): The former subsection (3) was adopted in the belief that the state and federal law required this provision. Recent legal opinions have called this position into question, and the current legal thinking is that this provision is no longer constitutionally required. The Department does not believe that other policy reasons support the continuation of this rule absent a constitutional mandate. In KDM vs. Reedsport, the Ninth Circuit did not find that the rule unconstitutional based on the specific fact situation in that case. Given the Ninth Circuit's opinion in the Reedsport case, the former subsection (3) is likely to invite continued litigation to clarify the factual parameters of what exactly constitutes an undue burden on the free exercise of religion. This rule change would eliminate the costs of this potential litigation.

Documents Relied Upon: Federal regulations and commentary, KDM vs. Reedsport, Case No. 98-35186 (9th Cir. 2000)

Fiscal and Economic Impact: Unknown

Administrative Rule Advisory Committee consulted? ☐ Yes ☒ No
If "No", why not? The State Board of Education acts as the Administrative Rule Advisory Committee for the Department of Education.

/s C. Gregory McMurdo
C. Gregory McMurdo, Executive Legal Officer

ODE template based on ARC925-1997

Public Agency Responsibility for Private School Children with Disabilities and Limitation on Services

581-015-0166(1) No private school child with a disability has an individual right to receive some or all of the special education and related services that the child would receive if enrolled in a public school.

(2) Decisions about the services that will be provided to private school children with disabilities must be made in accordance with OAR 581-015-0171 and –0151.

[*(3) Such special education and related services shall be provided in a religiously-neutral setting.*]

(3) [*(4)*] The services provided to private school children with disabilities must be provided by personnel meeting the same standards as personnel providing services in the public schools or ECSE program.

(4) [*(5)*] (Private school children with disabilities may receive a different amount of services than children with disabilities in public schools.

(5) [*(6)*] No private school child with a disability is entitled to any service or to any amount of a service the child would receive if enrolled in a public school.

(6) [*(7)*] Public agencies are not required to develop an IEP or IFSP that assumes a public agency placement for each private school child each year.

(7) [*(8)*] If a parent of a private school child with a disability requests an IEP or IFSP meeting, the public agency shall either:

(a) hold an IEP meeting within a reasonable time; or

(b) provide the parent with prior written notice of the public agency's refusal to hold an IEP or IFSP meeting.

Stat. Auth.: ORS 343.041, ORS 343.055 & CFR § 76.650

Stats. Implemented: ORS 343.155

Hist.: 1EB 28-1978, f. & ef. 7-20-78; 1EB 25-1980, f. & ef. 11-7-80; EB 12-1995, f. & cert. ef. 8-25-95; ODE 16-2000, f. & cert. ef. 5-23-00

rh admin/hodges/oars/working document oars/581-015-0166
as drafted 9/14/00

(7)

No. 00-131

Supreme Court, U.S.
FILED
OCT 25 2000
CLERK

IN THE
Supreme Court of the United States

K.D.M., a minor, by and through his father and next friend, W.J.M.,
Petitioner,

v.

REEDSPORT SCHOOL DISTRICT and STAN BUNN, in his official capacity as Oregon Superintendent of Public Instruction,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

REPLY BRIEF OF PETITIONER

Of Counsel:
RICHARD W. GARNETT
Notre Dame Law School
Notre Dame, IN 46556
(219) 631-6981

MICHAEL STOKES PAULSEN
University of Minnesota
Law School
229 19th Ave. S.
Minneapolis, MN 55455
(612) 625-0018

DAVID C. GIBBS, JR.
Counsel of Record
DAVID C. GIBBS III
CHARLOTTE A. COVER
BARBARA J. WELLER
GIBBS LAW FIRM, P.A.
5666 Seminole Boulevard,
Suite 2
Seminole, Florida 33772
(727) 399-8300
Attorneys for Petitioner

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

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PETITIONER'S REPLY

Introduction

This case presents the question whether the Free Exercise and Equal Protection Clauses prohibit government discrimination on the basis of religion in the specific context of a government program providing special education services to disabled children. In the Petition for Certiorari, we showed that this question is an important and recurring one that has arisen throughout the nation in a variety of factual contexts (Pet. 11-16, 20-21). The State Respondent's Brief in Opposition ("Opp.") does not appear to disagree.[1] Stripped of its formulaic catch phrases—Respondent asserts, *e.g.*, that Petitioner's claims are "fact-bound" (Opp. 8), and that the alleged split is "more apparent than real" (Opp. 11)—Respondent's brief effectively concedes that the decision and reasoning of the Ninth Circuit conflicts with the decision of the Eighth Circuit in a case involving similar facts, *Peter v. Wedl*, 155 F.3d 992 (8th Cir. 1998), and also with those of the Sixth and Third Circuits. *Hartmann v. Stone*, 68 F.3d 973 (6th Cir. 1995); *Brown v. Borough of Mahaffey, Pa.*, 35 F.3d 846 (3d Cir. 1994).[2] As Respondent puts it, "[a]n examination of those decisions, admittedly, may reveal some analytical tension between them" (Opp. 8). "Some analytical tension" is a decided understatement.

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[1] Respondent Reedsport School District filed its own Brief in Opposition (Dist. Opp.). Because the District has, for the most part, merely incorporated by reference the State's arguments, this Reply focuses on the State Respondent's Brief in Opposition, except where specifically noted.

[2] Respondent also recognizes the tension between the decision below and this Court's decisions in *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993), and *McDaniel v. Paty*, 435 U.S. 618 (1978). (Opp. 10-11).

Having conceded a conflict, the State Respondent advances two arguments against certiorari: *first,* Respondent insists that this case "will soon be moot" (Opp. 11); and *second,* Respondent contends that this case is too "fact-bound" (Opp. 8) to serve as a vehicle for resolving the admitted conflict among the Circuits on the important constitutional questions raised in the Petition. Neither argument has much substance.

I.

Respondent suggests that the case "is on the verge of becoming moot" (Opp. 12), in light of a contemplated change in the state's regulation (Opp. 11-14). This suggestion is wrong. Even a repeal of the state's regulation would not moot Petitioner's claims *against the Reedsport School District,* the other Respondent in this case,[3] just as a similar mid-litigation regulatory change did not moot the claims in *Peter v. Wedl. See* 155 F.3d at 995-996 (noting change in rule), *on remand, Westendorp v. Indep. Sch. Dist. No. 273,* 35 F. Supp. 2d 1134 (D. Minn. 1998) (awarding "retrospective equitable relief" in light of school district's past denial of special educational services). Here, as in *Peter,* Petitioner ultimately seeks relief against the District. This relief may include, for example, compensatory provision of on-site special services for the number of years that such services were unlawfully denied in the past. *See Westendorp,* 35 F. Supp. 2d at 1138 (ordering six years of on-site special education services at child's religious school as remedy for six years of unlawful denial of such services).[4]

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[3] In its Brief in Opposition, the District stated that its policy and practice was to "follow the rules promulgated by the State Department of Education relating to delivery of services . . . in the case of K.D.M." (Dist. Opp. 1).

[4] *See generally Florence County Sch. Dist. v. Carter,* 510 U.S. 7, 12-16 (1993) (awarding compensatory remedy for wrongful denial of special education); *Burlington School Committee v. Department of Education,*

Thus, even if the State were to change its administrative rule and, indeed, even if the District then changed its own policy and practice *prospectively*, such doubly-contingent changes would not moot the school district's past unconstitutional discrimination, nor would it moot Petitioner's claims for relief for such past violations. All a change in the state's regulations would mean is that the District could no longer defend its religion-based denial of on-site special education services to Kai Moore by insisting that state law required such discrimination. But this was never much of a defense -- state law cannot justify a violation of the Constitution, U.S. Const. art. VI, sec. 2—and, in any event, the District's loss of an asserted state law justification for its practices would not moot Petitioner's federal constitutional claims for relief against the District.

It is noteworthy that the District's Brief in Opposition does not include any commitment to a change in policy, in the event that the State does repeal its rule (*See* Dist. Opp. 1). Nor has the District—the party actually responsible for providing special education services to Kai—committed to providing full compensatory relief (as in *Peter, supra*). In short, the State Respondent's assurances notwithstanding, this case can only become moot if *both* Respondents agree to provide Petitioner with the relief to which he may be entitled, or if the parties reach a settlement. And this does not appear to be in the cards. *Compare Piscataway Tp. Bd. of Educ. v. Taxman*, 522 U.S. 1010 (Mem) (1997) (dismissing writ of certiorari after parties reached settlement).

In sum, this case is *not* moot. The issue of religion-based discrimination in the administration of government programs remains perfectly framed by the facts of this case: The

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471 U.S. 359, 369-371 (1985) (same); *cf. Milliken v. Bradley*, 433 U.S. 267, 281-284 (1977) (*Milliken II*) (discretion to fashion remedies tailored to rectifying past constitutional violations).

Reedsport School District has refused to provide Kai Moore with "a vision specialist . . . in his classroom . . . because [his school] is a sectarian religious school." Stipulated Facts, para. 6 (Opp.-App. 2); *see also id.* at para. 12 ("The District is not providing the services of a vision specialist . . . because the School District and the State of Oregon believe the setting is not religiously-neutral.") (Opp.-App. 4).[5] This is, as everyone admits, the *only* reason that on-site disability services were denied to Kai. Notwithstanding Respondent's claim that the State plans to repeal its unconstitutional rule (Opp. 11-12), this case provides an excellent, straightforward vehicle for resolving an important constitutional question on which the lower federal courts are badly divided.[6]

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[5] Respondent devotes several pages to a discussion of other reasons why a school district in Oregon might, at its discretion, deny on-site disability services to all private school children. But it does not matter whether other school districts have policies of not providing on-site special education at any private school (Opp. 3-6), because that has not been the Reedsport School District's policy and was never the reason given for its refusal to provide on-site services to Kai Moore. The reason the District has denied such services—the only reason—is because of the religious nature of the school. Stipulation of Facts, paras. 6, 12 (Opp.-App. 2, 4); *see also* Dist. Opp. 1.

Respondent also makes the strange suggestion (Opp. 1-2) that this case turns on whether special education services occur in Kai's regular classroom at Harbor Baptist, or in a separate classroom at Harbor Baptist. In this case, however, the parties stipulated that the reason why Kai would not be provided with on-premises special education was *because of the religious nature of the school.* Nothing in the record suggests that the District refused to provide on-premises special education at Harbor Baptist because Kai's family wished it to be in one classroom of the school rather than another.

[6] The case for review is not undermined by Respondent's assurances that the state rule in question could soon be repealed. As we show in this Reply, this case is not moot, nor is it "on the verge" of becoming moot (Opp. 12). Even if the state's rule were repealed—and, this being a democracy, Respondent cannot guarantee that it will be—this remains a live and important constitutional case. Repeal of the offending rule would

II.

This leaves only the State Respondent's observation that this case has distinctive facts, somewhat different from those in *Peter, Hartmann, and Brown* (Opp. 6-11). Indeed it does.[7] But any differences in factual details do not make this case an improper vehicle for addressing the important, common constitutional question addressed in all of these cases: Does the denial of a government benefit to an otherwise-eligible recipient, on the basis of religion, violate the Free Exercise and Equal Protection Clauses?

As Respondent observes, the court below upheld a challenge to a state law that discriminates on the basis of religion, on the ground that any burden imposed by the discrimination was merely "*de minimis*" (Opp. 9). But this Court's precedents clearly teach that discrimination on the

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do nothing to prevent future discrimination or to undo the error and confusion caused by the decision below. What is more, it is clear that government entities cannot avoid review of unconstitutional practices and policies merely by hinting in briefs that they plan to mend their ways in the future. *Cf.* St. Augustine, CONFESSIONS 169 (R.S. Pine-Coffin trans., 1961) ("I had prayed to you for chastity and said, 'Give me chastity and continence, but not yet.'"). Were it otherwise, such entities would have little incentive not to "return to [their] old ways." *City of Mesquite v. Aladdin's Castle, Inc.*, 455 U.S. 283, 289 n. 10 (1982). Given the timing of Respondent's assurances, and the fact that the conflict between the rule in question and controlling case law has been apparent for years, promises about the future conduct of legislative bodies should be accorded little weight. *See United States v. Oregon State Medical Society*, 343 U.S. 326, 333 (1952) (noting this Court's wariness of such "protestations of repentance and reform, especially when abandonment seems timed to anticipate suit, and there is probability of resumption").

[7] *See, e.g., Khan v. State Oil Co.*, 93 F.3d 1358, 1362 (7th Cir. 1996) (Posner, J.) ("It is not cricket to distinguish a precedent by pointing to a fact mentioned by the court in the previous opinion but clearly given no weight by it. Otherwise, no precedents would have any force, for no two cases are exactly alike."), *vacated on other grounds, State Oil Co. v. Khan*, 622 U.S. 3 (1997).

basis of religion in the administration of government benefit programs is unconstitutional, *period*, unless justified by a compelling state interest (Pet. 16-20) -- a one-penny tax levied on all Presbyterians would impose only *de minimis* burdens, but would obviously violate the First Amendment. As we established in the Petition, the decision of the court below to the contrary conflicts squarely with the decisions of several other Circuits (Pet. 11-16).

Respondent's efforts to explain away the conflict, by noting the unremarkable fact that the various courts' decisions involve "different fact patterns" (Opp. 9), are unconvincing. Respondent asserts that the decisions in *Peter* and *Hartmann* turned on their differing fact patterns. With respect to *Peter*, though, Respondent admits that the school district in that case "refused to provide the services . . . at the child's religious school," but provided the services to children who were educated in a "neutral site" (Opp. 9). Concerning *Hartmann*, Respondent concedes that "the Army in fact treated day-care providers who included some religious practices differently from those who did not" (Opp. 10). Here, the Reedsport School District treated Kai Moore differently than it treated other special needs children, solely because he attended a religious school. It is the legal analysis employed in *Peter* and *Hartmann*, and not these cases' facts, that conflicts with the decision below. *See* Pet.-App. 17a-19a (Kleinfeld, J., dissenting) (noting conflict between the decision of the court below, on the one hand, and those in *Hartmann*, *Brown*, and *Peter*, on the other).

Similarly, Respondent's claim that *Brown* "is strikingly dissimilar to this case" (Opp. 10) is not persuasive. Yes, *Brown* arose in a different factual context. Still, the Third Circuit held that a plaintiff need not demonstrate a substantial burden when challenging a law that specifically targets or discriminates against religion. 35 F.3d at 849-850 ("The rare cases which address acts or laws which target religious

activity have never limited liability to instances where a 'substantial burden' was proved by the plaintiff. . . . Applying such a burden to non-neutral government actions would make petty harassment of religious institutions and exercise immune from the protection of the First Amendment.") (citation omitted). The Ninth Circuit below held otherwise (Pet.-App.9a-11a). And the Third Circuit both considered and rejected the proposition that *de minimis* burdens on religion insulate discriminatory state action from First Amendment scrutiny.[8] But the Ninth Circuit ruled otherwise. Pet.-App. 10a; *see also* Pet.-App. 22a (Kleinfeld, J., dissenting) ("[T]here is no such thing as a *de minimis* exception to the Free Exercise Clause.").[9]

In sum, this case does not involve the "fact-bound" application of settled law. Rather, the court below, in contrast with other federal courts, applied the wrong standard and reached the wrong result. That is, the question here is not whether the court below mis-applied the right rule -- *i.e.*, the

---

[8] Contrary to Respondent's suggestion, the "impact" on religion (Opp. 10) in *Brown* could also fairly be said to have been *de minimis*: The Borough erected and locked a gate between a public park and property which was to be used by the plaintiffs for entering and exiting their religious tent revival meetings. The plaintiffs only had to walk an extra few hundred feet to get around the locked gate and enter or exit the tent meeting. *Brown*, 35 F.3d at 848. Indeed, the district court had rejected the First Amendment claim because the plaintiffs had not demonstrated that the extra walk was a "substantial burden" on their free-exercise rights. *Id.* at 847.

[9] Respondent's efforts to avoid the force of this Court's decisions in *Lukumi* and *McDaniel* are unconvincing (Opp. 10-11). The key to these cases, as Justice Brennan put it in *McDaniel*, is the principle that "government may not use religion as a basis of classification for the imposition of duties, penalties, privileges or benefits." 435 U.S. at 639 (Brennan, J., concurring). Whether government discrimination forces a minister to give up his vocation, or denies a disabled child special-education services at his religious school, it is discrimination—and it is unconstitutional—just the same.

rule that the Free Exercise and Equal Protection Clauses do not permit religious discrimination in the administration of government benefit programs, unless that discrimination is justified by a compelling state interest -- but a case where the court below departed from the correct rule, and where review is needed to correct both a legal error and a constitutional law conflict.

CONCLUSION

For all these reasons, and for the reasons set out in the Petition for Certiorari, we urge this Court to grant the Petition.

Respectfully submitted,

Of Counsel:
RICHARD W. GARNETT
Notre Dame Law School
Notre Dame, IN 46556
(219) 631-6981

MICHAEL STOKES PAULSEN
University of Minnesota
Law School
229 19th Ave. S.
Minneapolis, MN 55455
(612) 625-0018

DAVID C. GIBBS, JR.
Counsel of Record
DAVID C. GIBBS III
CHARLOTTE A. COVER
BARBARA J. WELLER
GIBBS LAW FIRM, P.A.
5666 Seminole Boulevard,
Suite 2
Seminole, Florida 33772
(727) 399-8300
Attorneys for Petitioner